Supreme Court, U.S.
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No. 09-_____ 09-888 JAN 20 2010

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In The

Supreme Court of the United States

LELAND GRASKE,

Petitioner,

v.

DANIEL DOYLE AND ANNE DOYLE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANCIE C. RIEDMANN
Counsel of Record
THOMAS A. GRENNAN
GROSS & WELCH, P.C., L.L.O.
2120 South 72nd Street,
Suite 1500
Omaha, NE 68124
(402) 392-1500
(402) 392-8101 – facsimile
friedmann@grosswelch.com

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent, Dan Doyle, was one of three passengers aboard a six-person boat in the territorial waters of the Cayman Islands, who was ejected when the boat's steering mechanism failed. Contrary to this Court's directive that admiralty jurisdiction of the federal courts extends to "only those torts occurring on the navigable waters of the United States," the Eighth Circuit Court of Appeals elected to exercise subject matter jurisdiction under the guise of admiralty jurisdiction. In doing so, the Eighth Circuit added to the disparity that already exists among the federal courts regarding the extent of admiralty jurisdiction in foreign waters.

The questions presented are:

1. Do the federal courts possess admiralty jurisdiction over common law tort actions for personal injuries that occur in the territorial waters of a foreign nation?

2. Is notice of a danger a prerequisite for imposing liability upon the operator of a pleasure boat?

PARTIES TO THE PROCEEDINGS

Petitioner-Defendant: Leland Graske

Respondents-Plaintiffs: Daniel Doyle and Anne Doyle

Dismissed Parties – Third-Party Defendants:

Jason R. Haynes – voluntarily dismissed without prejudice October 5, 2007.

Caribe Inflatables USA, Inc. – dismissed without prejudice for lack of personal jurisdiction September 27, 2006.

Kirk Marine – dismissed without prejudice for lack of personal jurisdiction September 27, 2006.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Leland Graske, respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court's opinion is reported at 565 F. Supp. 2d 1069 (D. Neb. 2008) (App. 20). The Eighth Circuit Court of Appeals' Opinion is reported at 579 F.3d 898 (8th Cir. 2009) (App. 1).

JURISDICTION

The Eighth Circuit filed its opinion on September 2, 2009 (App. 1). The parties' cross motions for en banc hearings were denied on October 22, 2009 (App. 69). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE

Article III of the United States Constitution states:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be

> made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Art. III § 2, cl. 1.

Admiralty jurisdiction is vested in the district courts pursuant to 28 U.S.C. § 1333.

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C. § 1333.

STATEMENT

This case concerns the authority of the United States federal courts to exercise admiralty jurisdiction over a tort that occurred in the territorial waters of the Cayman Islands approximately 300 yards from its shore. In *United States v. Louisiana,* 394 U.S. 11, 22-23 (1969), this Court recognized that "under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them." It further recognized that the inland waters "are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. . . ." Two years later, this Court stated that "[t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States." *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 205 (1971).

Despite this limitation, the lower court exercised admiralty jurisdiction to determine whether the operator of a pleasure boat was liable for injuries that his passenger sustained in the territorial waters of the Cayman Islands when he was ejected from the boat. Both parties were residents of the state of Nebraska and were vacationing together in the Cayman Islands. The boat had recently been negligently repaired by a Cayman Island marina. It was this negligent repair that caused the steering

mechanism to fail (App. 5, 51, 55), and the district court found that the Petitioner was not negligent in failing to discover the mechanic's negligence (App. 50).

In an attempt to obtain jurisdiction over the boat manufacturer, mechanic and the marina responsible for the negligent repairs, Petitioner removed the case to federal court (App. 2; App. 5). The Eighth Circuit determined that the removal was improper but that Respondents had not objected (App. 2).

The evidence reveals that Petitioner, Respondent and another friend embarked upon a fishing excursion in a six-passenger boat owned and operated by Petitioner (App. 2-3). The boat's operating manual instructed that the boat was to be operated "on plane" (App. 72), meaning at a speed at which the hull was skimming across the water (App. 3). It further instructed that in order to obtain planing, the weight inside the boat should be moved toward the bow (App. 72). Upon departure, and at the time of the accident, Petitioner was near the stern, or rear, of the boat at the controls, Respondent was in the bow and the remaining passenger was seated directly between the two.

After leaving the 200 yard no-wake zone, Petitioner began to accelerate (App. 3). As the boat began to plane, the steering mechanism failed, causing the boat to turn suddenly and sharply to the left (App. 3). Respondent was ejected over the side of the boat (App. 4).

Despite well-established precedent that the operator of a boat is not the insurer of his passengers' safety, the lower court imposed liability upon Petitioner for operating the boat while Respondent was in a "position of danger" (App. 6), without evidence that Petitioner had notice that the bow area was a position of danger. The boat had a seating capacity of six; at capacity, two passengers would be seated on the bow seat, two on the mid-ship seat and two in the stern (rear) (App. 3). Handholds were available for persons in the bow. (App. 3). The operator's manual stated that "In order to achieve maximum performance the boat should reach its planing conditions." (App. 72). The manual further recommended that the weight of payload and persons be evenly distributed and that if planing was difficult, the weight should be moved forward (toward the bow) (App. 72). Despite these specific instructions from the boat manufacturer, the lower court found that the bow area was a "position of danger" and that Petitioner "should have known not to accelerate while [Respondent] was seated there." (App. 6).

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition to resolve the conflict among the lower courts as to whether the United States district courts have admiralty jurisdiction over torts occurring in the territorial waters of a foreign nation over which that nation has complete sovereignty. This Court's statement in *Victory*

Carriers that "maritime law governs only those torts occurring on the navigable waters of the United States" has been interpreted by some district courts as limiting federal admiralty jurisdiction to navigable waters of the United States and the high seas, while other federal district courts have disregarded this statement as *dicta* and relied upon Article III, § 2, cl. 1 of the United States Constitution as granting broad authority over all navigable waters.

Second, the Court should grant this Petition to restore the standard of care under which a boat operator is held liable to his passengers. Case law has drifted from imposing a "reasonable care" standard, toward a standard that requires the operator to act as an insurer of his passengers' safety. Direction is needed from this Court to steer the standard back to that of reasonable care.

I. The Lower Courts Have Not Uniformly Adhered To This Court's Directive That Admiralty Jurisdiction Applies Only To Those Torts Occurring On The Navigable Waters Of The United States. This Court's Intervention Is Required To Establish Uniformity.

The federal district courts disagree on whether federal admiralty jurisdiction applies to torts occurring in the territorial or inland waters of a foreign nation. Compare *Dunham v. Hotelera Canco S.A. de C.V.*, 933 F. Supp. 543, 547 (E.D.Va. 1986) and *Sharma v. Skaarup Ship Management Corp.*, 699

F. Supp. 440, 448 (S.D.N.Y. 1988), aff'd, 912 F.2d 820 (2d Cir. 1990) with *Szollosy v. Hyatt Corp.*, 208 F. Supp. 2d 205 (D. Conn. 2002) and *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 117-19 (5th Cir. 1995).

Courts refusing to exercise federal admiralty jurisdiction over torts occurring in the territorial waters of a foreign nation do so primarily in reliance upon this Court's statement in *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 205 (1971). In *Victory Carriers, Inc.*, this Court stated that "the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and . . . maritime law governs only those torts occurring on the navigable waters of the United States." *See, e.g.*, *Dunham v. Hotelera Canco S.A. de C.V.*, 933 F. Supp. 543, 547 (E.D.Va. 1996) (finding that admiralty jurisdiction was not proper where tort occurred in territorial waters of Mexico); *Sharma v. Skaarup Ship Management Corp.*, 699 F. Supp. 440, 448 (S.D.N.Y. 1988) (denying federal admiralty jurisdiction where tort occurred in waters of British Columbia), aff'd, 916 F.2d 820 (2d Cir. 1990) (issue not reached), cert. denied, 499 U.S. 907 (1991); and *St. Pierre v. Maingot*, 2002 WL 31655355, *3 (E.D.La.) (not reported in F. Supp. 2d) (refusing to apply maritime jurisdiction to a tort occurring in the Cayman Islands, because federal maritime jurisdiction applies to the navigable waters of the United States and the "high seas", but does not extend into the territorial waters of other nations).

Courts that are willing to extend federal admiralty jurisdiction into the waters controlled by

foreign nations do so simply on the basis that the waters are "navigable waters." *See Szollosy v. Hyatt Corp.*, 208 F. Supp. 2d 205 (D. Conn. 2002) (determining that admiralty jurisdiction is unaffected by the alleged foreign situs of the accident); *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 179 (3rd Cir. 1995); and *Malaysia Intern. Shipping Corp. v. Sinochem Intern. Co. Ltd.*, 436 F.3d 349, 354, n.1 (3rd Cir. 2006) (stating "we note that a tort need not have occurred in waters under the jurisdiction of the United States for us to exercise admiralty jurisdiction.") (rev'd on other grounds, 549 U.S. 422 (2001)).

The district courts are not in agreement as to whether they may exercise federal admiralty jurisdiction over torts that occur in the territorial waters of a foreign nation. This dichotomy has led to inapposite results depending upon the district in which the law suit was brought. Inland waters of a foreign nation "are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. . . ." *United States v. Louisiana*, 394 U.S. 11, 22-23 (1969). To allow United States federal admiralty jurisdiction to extend into those inland waters would violate the governing nation's sovereignty and grant federal courts jurisdiction in an area in which it is not authorized. Just as federal admiralty law has limitations to its application in both situs and nexus with maritime activity, *see Sisson v. Ruby*, 497 U.S. 358, 364-67 (1990), so, too,

does the situs condition carry with it certain restrictions. *See Dunham v. Hotelera Canco S.A. de C.V.*

In *Dunham,* a tourist was injured while snorkeling in the territorial waters of Mexico. *Id.* at 545. The plaintiff asserted admiralty jurisdiction in its suit against the tour operators. *Id.* The district court granted defendants' motion for summary judgment on the basis that admiralty jurisdiction did not exist because the accident occurred in the territorial waters of Mexico. Addressing the "location" test, the court stated:

> In this case, plaintiff fails to show that the location of her accident was within the boundaries of federal admiralty jurisdiction. The Nizuc Reef, in particular the area in which plaintiff was injured, is admitted by the plaintiff to be within the territorial waters of Mexico. Federal maritime jurisdiction applies to the navigable waters of the United States and to the "high seas," but does not extend into the territorial waters of other nations.

Id. at 547, *citing Victory Carriers, Inc.,* 404 U.S. at 205.

The present accident occurred approximately 300 yards from the shore of the Cayman Islands, well within the territorial waters of the Islands. Because the accident did not occur upon the navigable waters of the United States or upon the "high seas," federal admiralty jurisdiction did not exist and the lower court erred in adjudicating the merits of the case.

Justice Thomas recognized that federal admiralty jurisdiction was not limitless when he advocated a bright-line rule in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring):

> I write separately because I cannot agree with the test the Court applies to determine the boundaries of admiralty and maritime jurisdiction. Instead of continuing our unquestioning allegiance to the multifactor approach of *Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 111 L.Ed.2d 292 (1990), I would restore the jurisdictional inquiry to the simple question whether the tort occurred on a vessel on the navigable waters of the United States. If so, then admiralty jurisdiction exists. This clear, bright-line rule, which the Court applied until recently, ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction.

By restoring the bright-line rule, courts and litigants are clearly guided in the scope of federal admiralty jurisdiction. The dichotomy among the courts would be eliminated.

II. Despite Established Precedent That The Owner Of A Boat Is Not An Insurer Of Its Passengers' Safety, The Courts Have Not Consistently Required, As A Prerequisite, A Finding That The Owner Had Notice, Actual Or Constructive, Of The Danger.

"The decision in this case has importance in admiralty law beyond what might appear on the surface. It marks another substantial stride toward the development by this Court of a doctrine that a ship owner is an insurer for those who perform any work on or around a ship subject to maritime jurisdiction." *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 216 (1963) (Harlan, J., dissenting).

So, too, does the present case have importance in admiralty law beyond what might appear on the surface. Just as *Gutierrez* went one step further toward a doctrine that a ship owner is an insurer for those who perform work on a ship, so, too, does the present action take one step further toward the development of the doctrine that a ship owner is an insurer for the safety of his recreational passengers.

This is contrary to century old precedent. *See Elder Dempster Shipping Co. v. Pouppirt*, 125 F. 732 (4th Cir. 1903). More recent courts have attempted to maintain this standard. *See Summers v. Motor Ship Big Ron Tbm*, 262 F. Supp. 400, 404 (D.C.S.C. 1967); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir. 1983); and *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1238 (S.D. Fla. 2006).

To prevent elevating a ship owner to an insurer, this Court has required a finding of negligence on the part of the ship owner or operator. *See McAllister v. United States,* 348 U.S. 19 (1954). That the operator "knew or should have known" that injury was likely to result was the standard to which an owner or operator was held. *See Gutierrez v. Waterman S.S. Corp.* Inherent in this standard is the requirement of notice. While that standard was recognized in *Gutierrez,* as noted by Justice Harlan, it was disregarded.

> In order to conclude that the respondent ship owner was negligent in the circumstances presented here, it was necessary for the trier of fact to find that the respondent knew or should have known of the defective condition of the bags being unloaded. It is doubtful that such a finding was made by the trial judge in this case – the closest he came was the statement that the ship owner was negligent in permitting broken and weakened bags to be discharged "when it knew or should have known that injury was likely to result." This finding passes over the basic question: Whether respondent had notice, or constructive notice, of the condition of the bags themselves.

Id. at 219-20.

Likewise, in the present action, the lower court recognized the "knew or should have known" standard, but passed over the basic question of whether the Respondent had actual or constructive notice,

that the bow was a position of danger. Passengers had to utilize the bow cushion in order for the boat to accommodate six passengers. Handholds were strategically located in the bow for those passengers. The operator's manual instructed that the boat should be operated at planing speeds, and that to achieve planing, weight needed to be transferred to the bow section of the boat. The lower court's failure to require proof that Respondent had notice, actual or constructive, that the bow cushion was a position of danger eliminated the requirement of notice. As in *Gutierrez,* it moved one step further toward a doctrine that an owner of a boat is an insurer for its passengers' safety.

CONCLUSION

Conflict exists among the district courts in determining whether admiralty jurisdiction extends to torts arising in the territorial waters of foreign nations. Some courts have disregarded this Court's statement in *Victory Carriers* that admiralty jurisdiction only extends to torts occurring on the navigable waters of the United States, while other courts have heeded this limitation. A bright-line rule needs to be established to create uniformity.

Just as the Court has erroneously moved one step closer to insuring the safety of ship workers, the lower court's order moves one step closer to that same standard for recreational passengers. While the lower

court gave lip service to the requirement that a ship owner "knew or should have known" of a danger, it failed to require proof of any such notice. When a court imposes liability without evidence of notice of a danger, it elevates the ship owner to an insurer of his passengers' safety.

Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

FRANCIE C. RIEDMANN
Counsel of Record
THOMAS A. GRENNAN
GROSS & WELCH, P.C., L.L.O.
2120 South 72nd Street,
Suite 1500
Omaha, NE 68124
(402) 392-1500
(402) 392-8101 – facsimile
friedmann@grosswelch.com

Attorneys for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3144

Daniel Doyle; Anne Doyle, Plaintiffs/Appellees, v. Leland Graske, Defendant/Appellant, v. Jason R. Haynes; Caribe Inflatables USA, Inc.; Kirk Marine, Third Party Defendants.	* * * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

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Submitted: April 16, 2009
Filed: September 2, 2009
Amended: October 21, 2009

Before LOKEN, Chief Judge, HANSEN and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Daniel Doyle suffered injuries while he was a passenger on a boat owned and operated by Leland Graske. Doyle and his wife brought an action in Nebraska state court, claiming that Graske was negligent in his operation of the boat. Graske removed the case to federal district court, invoking admiralty jurisdiction. Removal based on admiralty jurisdiction was improper under 28 U.S.C. § 1441, *see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959), but the Doyles waived their objection to improper removal by failing to seek a remand to state court, and the district court properly exercised jurisdiction over claims that could have been brought originally in federal court. *See Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001). The district court, sitting without a jury, found that Doyle's injuries were caused by Graske's negligence, and awarded compensatory damages to Doyle, as well as loss-of-consortium damages to his wife, Anne. We affirm the district court's judgment in favor of Daniel Doyle, but reverse its award of loss-of-consortium damages to Anne Doyle.

I.

On October 31, 2003, Graske and two friends, Daniel Doyle and Robert Van Hook, decided to go fishing in the waters off the coast of Grand Cayman Island, where Graske owned a vacation home. The

three set out on Graske's inflatable boat at around 10:30 a.m. The boat was fourteen feet long, with a seventy-horsepower engine and room for six passengers. It featured two seats at the stern (or rear), two more at midship, and a cushion for two passengers at the bow (or forward end). Both seats at the stern faced forward and included backrests. The stern seat on the starboard side (*i.e.*, the right side while looking forward) was known as the "helm seat" because of its position opposite the boat's steering wheel, located on a console at midship. The forward side of the console functioned as a backrest for the starboard midship seat. The other midship seat (on the port, or left, side) and the bow cushion seats did not have backrests, and passengers sitting on the latter had to ride facing the rear. An inflatable tube formed most of the boat's hull, and there were hand straps along the top of the tube for passengers sitting at midship or in the bow.

From the helm seat, Graske steered the boat slowly through the no-wake zone – a zone extending two hundred yards from shore in which boats are prohibited from traveling above five miles per hour. When the boat was past the zone, Graske said, "Here we go," or words to that effect, and began accelerating. As the boat came on plane – that is, reached a speed at which its hull was no longer displacing the water, but skimming across it – a nylock nut came loose from the boat's steering system, causing the system to malfunction and the boat to turn abruptly and sharply to the left.

Despite the sudden turn, Graske was able to maintain his position behind the steering wheel. Van Hook, who was sitting on one of the midship seats, managed to remain on the boat as well. Doyle, however, was thrown overboard. Accounts differ concerning where Doyle was located when he was ejected. According to Graske, Doyle was sitting on the inflatable tube, with his feet between the starboard midship and bow seats, and with at least one hand on a hand strap. According to Van Hook, Doyle was seated on the bow cushion (having moved there from the tube), and was not holding any hand strap. Doyle himself cannot remember.

Wherever he was sitting, Doyle was thrown into the water, and as the boat continued turning counterclockwise, it struck him in the back and on the head. Graske immediately put the boat in neutral. Doyle was some distance from the boat, injured but conscious. Graske brought the boat closer to Doyle, and Van Hook grabbed hold of him, eventually pulling him onto the inflatable tube.

Graske guided the boat to shore. From there, Doyle was transported to a local hospital and then transferred to medical facilities in the United States. Doctors diagnosed him with a flail chest, his respiration hindered by multiple rib fractures. Because of difficulties breathing, Doyle suffered permanent brain injury while hospitalized.

Doyle brought an action against Graske in Nebraska state court, claiming negligence in Graske's

operation of the boat. Graske removed the case to federal district court, invoking admiralty jurisdiction under 28 U.S.C. § 1333(1). He sought to implead several third-party defendants, including a mechanic who repaired and reassembled the boat's steering system just days before the accident. Graske, however, was unable to establish personal jurisdiction over the third-party defendants, and his claims were ultimately dismissed without prejudice. Doyle filed an amended complaint, adding his wife, Anne, as a plaintiff.

Following a bench trial, the district court entered judgment in favor of the Doyles. Applying general maritime law, the court found that Graske was negligent in his operation of the boat, and that Graske's negligence was a proximate and substantial cause of Doyle's injuries. It also determined that Doyle's own negligence contributed to his injuries, because he should have been more aware of the dangers around him. The court apportioned ninety percent of the fault for Doyle's injuries to Graske and potential tortfeasors, including the mechanic, and the remaining ten percent to Doyle himself. Taking account of Doyle's comparative negligence, the court awarded $3,238,153 in compensatory damages to Doyle. It also awarded $750,000 in damages for loss of consortium to Anne, but that amount did not reflect any proportional reduction for Doyle's comparative fault. Graske appeals.

II.

Graske first challenges the district court's finding that he was negligent in the operation of the boat. Because negligence in admiralty is a factual determination, we may not set aside the district court's finding unless it is clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 20 (1954). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Id.* (internal quotations omitted).

Under general maritime law, a boat owner owes a duty of reasonable care to passengers lawfully aboard his boat. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959). The district court found that Graske breached this duty by bringing the boat on plane while Doyle was seated in "a position of danger." The court acknowledged that according to Graske, Doyle was sitting on the tube when the accident occurred, whereas according to Van Hook, Doyle was sitting on the bow cushion. But the court determined that this difference of opinion was immaterial, because "both the tube and the bow cushion seat are positions of danger while accelerating a small watercraft on the open ocean." Given that Doyle was sitting at either one position or the other, the court reasoned that Graske should have known that it was unsafe to accelerate. Accordingly, the court concluded that by bringing the boat on plane, Graske

failed to exercise reasonable care for Doyle's safety, and was thus negligent in his operation of the boat.[1]

Graske does not dispute that his actions were negligent if Doyle was sitting on the tube. Indeed, various boating experts testified at trial that sitting on the tube was unsafe while the boat was planing, and there was no testimony to the contrary. Graske focuses instead on the district court's finding that his operation of the boat was negligent if Doyle was sitting on the bow cushion. Graske argues that this finding is clearly erroneous. We disagree.

At trial, Michael Sampsel, a mechanical and marine engineer, testified that the bow cushion was an unsafe position while the boat was on plane. Sampsel noted that the cushion was naturally subject to greater motion at higher speeds, given its location in the boat's bow. According to Sampsel, however, the cushion's design did not account for such increased motion. Quite the opposite, he explained, the cushion's short height – just 13.5 inches above the deck – meant that passengers would be sitting in an unusual posture, with their knees higher than normal. He also noted that the lack of thigh restraints or backrests meant that passengers would be prone to sliding

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[1] Graske contends that the district court abused its discretion by failing to make a specific finding of fact as to where Doyle was sitting when the accident occurred. Because Doyle's exact seating position is not an ultimate fact necessary to reach a decision, we reject Graske's contention. *See Allied Van Lines, Inc. v. Small Bus. Admin.*, 667 F.2d 751, 753 (8th Cir. 1982).

across the cushion. Sampsel acknowledged the presence of nearby hand straps, but maintained that they were meant for use in lifting the boat, not for use by passengers. In Sampsel's opinion, therefore, the bow cushion's location and design rendered the seat unsafe while the boat was on plane, and Graske violated safe boating practices if he proceeded to accelerate with Doyle sitting there.

The testimony of two other experts was not inconsistent with Sampsel's conclusion. Paul Larson, a marine surveyor and investigator, testified that when the boat was planing, a seat at midship was "a better and safer position" than one in the bow. He did not rule out the possibility that if Doyle was seated on the bow cushion when the accident occurred, then Graske's operation of the boat was negligent. According to Larson, whether Graske failed to exercise reasonable care would depend on the circumstances. Herbert Angell, a boating law administrator for the State of Nebraska, took a similar position. Like Larson, Angell testified that whether it was negligent to allow Doyle to sit on the bow cushion would depend on how fast the boat was traveling and other environmental conditions.

The only expert witness who stated categorically that sitting in the bow was safe at planing speed was Robert MacNeill, a boat manufacturing consultant. The district court noted, however, that MacNeill's expertise was in designing yachts, not small recreational vessels. The court therefore declined to credit MacNeill's testimony regarding the safe operation of

Graske's fourteen-foot boat. Giving due deference to the district court's determination of credibility, we cannot say that its refusal to accept MacNeill's testimony was unreasonable.

In light of the record as a whole, we conclude that substantial evidence supports the district court's conclusion that Graske breached a duty of reasonable care if Doyle was seated on the bow cushion when the boat came on plane. The definitive testimony of Sampsel, and the fact-dependent opinions of two other experts, provided sufficient basis for the court to find that the bow cushion was a position of danger under the circumstances, such that Graske should have known not to accelerate while Doyle was seated there. Given that the only other position where Doyle could have been located was on the tube – a position Graske does not dispute would have been unsafe – we hold that the district court's finding of negligence in Graske's operation of the boat is not clearly erroneous.

III.

Graske next challenges the district court's determination that his negligent operation of the boat was a proximate and substantial cause of Doyle's injuries. Issues of proximate causation in admiralty "involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). We may not disturb the district court's determination

unless it is clearly erroneous. *Am. Home Assurance Co. v. L & L Marine Serv., Inc.*, 875 F.2d 1351, 1354 (8th Cir. 1989).

Graske invokes the doctrine of superseding cause, arguing that the negligent repair of the boat's steering system superseded his negligent operation of the boat, thereby relieving him of liability for Doyle's injuries. The allegedly negligent repair of the boat, however, could not have been a superseding cause of Doyle's injuries. The doctrine of superseding cause applies "where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a *later* cause of independent origin that was not foreseeable." *Sofec*, 517 U.S. at 837 (emphasis added) (internal quotation omitted). Here, the allegedly negligent repair of the boat occurred *before* Graske's negligence, and thus could not have superseded it. Accordingly, the doctrine of superseding cause is of no avail to Graske.

Graske also invokes the doctrine of inevitable accident, arguing that Doyle's injuries would have occurred as a result of the failure of the boat's steering system, regardless of whether Graske's operation of the boat was negligent. We doubt that the doctrine of inevitable accident applies outside the context of collision liability, where it may be raised as an affirmative defense by vessels accused of causing collisions. *See The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 7-2, at 486-88 (2d ed. 1975).

But even assuming that the doctrine does apply in this general context, it would not apply in this case. An accident cannot be said to have been inevitable if it could have been prevented by "human skill and precaution, and a proper display of nautical skill." *The Louisiana*, 70 U.S. (3 Wall.) at 173. The district court did not clearly err in finding that Doyle's injuries could have been prevented if Graske had exercised reasonable care by waiting to accelerate until Doyle was seated at midship or the stern. After all, Graske and Van Hook were riding in those areas when the boat suddenly turned, and both were able to avoid harm. Doyle's injuries were therefore not the inevitable consequence of the malfunctioning of the boat's steering system. The district court's finding that Graske's negligence was a proximate and substantial cause of Doyle's injuries is not clearly erroneous.

IV.

Finally, Graske challenges the district court's award of loss-of-consortium damages to Doyle's wife, Anne. "Loss of consortium" refers to "loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations." *Black's Law Dictionary* 1031 (9th ed. 2009). In the context of marriage, the terms "loss of consortium" and "loss of society" are used interchangeably. *In re Midland Enters., Inc.*, 886 F.2d 812, 816 n.4 (6th Cir. 1989). Graske contends that general maritime law does not allow recovery for

loss of consortium by the spouse of a nonseafarer negligently injured beyond the territorial waters of the United States. A "nonseafarer" is someone, like Doyle, who is neither a seaman covered by the Jones Act, 46 U.S.C. § 30104, nor a longshore or harbor worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996). We review *de novo* the question whether general maritime law allows recovery for loss of consortium. *See In re Am. Milling Co.*, 409 F.3d 1005, 1013 (8th Cir. 2005).[2]

The Supreme Court's most recent guidance on how to approach this sort of problem came in *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009). There, the Court considered "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure." *Id.* at 2565. The Court began its analysis by reviewing the history of punitive damages under the common law generally and federal maritime law specifically. Based on that review, the Court determined that "punitive damages have long been available at common law," and that "the common-law tradition of punitive

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[2] The Doyles contend that Graske waived his argument that loss-of-consortium damages are unavailable under general maritime law by raising it for the first time in a post-verdict motion. In ruling on that motion, however, the district court considered and rejected Graske's argument on the merits. The issue is a purely legal one, and we proceed to consider it.

damages extends to maritime claims." *Id.* at 2569. The Court reasoned that because "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule," the only question remaining was whether the rule had been abrogated by Congress's enactment of the Jones Act, which provided seamen a statutory cause of action for negligence. *Id.* The Court concluded that the rule had survived the Jones Act, because the Act did not address either maintenance and cure or its remedy. *Id.* at 2572. Because Congress had not altered the traditional understanding regarding the availability of punitive damages in admiralty, the Court held that "such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law." *Id.* at 2575.

Applying the *Townsend* approach here, we conclude that there is no well-established admiralty rule, as there is with respect to punitive damages, authorizing loss-of-consortium damages as a general matter. In 1963, the question whether maritime law allowed recovery of loss-of-consortium damages by the wife of a longshoreman negligently injured in state territorial waters was "presented for the first time in a federal Court of Appeals." *Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257, 258 (2d Cir. 1963). In an opinion by Judge Friendly, the Second Circuit noted that common-law authorities regarding a wife's recovery for loss of consortium were "conflicting," *id.* at 265, and that there were no maritime

cases pertaining to the issue except for two district court decisions denying such recovery. *Id.* at 265-66. Against this backdrop, the court rejected the wife's loss-of-consortium claim. *Id.* at 267.

Loss-of-consortium damages were not definitively recognized under general maritime law in any context until 1974, when the Supreme Court held in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), that a wife could recover such damages for the wrongful death of her husband, a longshoreman killed in state territorial waters. Six years later, in *American Export Lines, Inc. v. Alvez,* 446 U.S. 274 (1980), the Court extended *Gaudet* to personal injury actions, holding that "general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." *Id.* at 276 (plurality opinion); *see id.* at 286 (Powell, J., concurring in judgment). The plurality in *Alvez* explained in its discussion of the Second Circuit decision in *Igneri* that although "the principles of maritime law prevalent in 1963 militated against, rather than supported, the creation of a right to recover for loss of society," *id.* at 280, *Gaudet* had since provided "the conclusive decisional recognition of a right to recover for loss of society that *Igneri* found lacking." *Id.* at 280-81.

The short history of loss-of-consortium damages in admiralty consists almost entirely of the Supreme Court's relatively recent decisions in *Gaudet* and *Alvez.* Given the narrow holdings of those decisions,

general maritime law on loss-of-consortium damages remains an area marked by few settled principles. Thus, unlike the Court in *Townsend,* which was not asked to "change maritime law in its operation as an admiralty court," we cannot simply apply a pre-existing general rule left unaltered by Congress. 129 S. Ct. at 2574 n.11.

The Court in *Alvez* recognized a right to recover loss-of-consortium damages for nonfatal injuries to a spouse in the territorial waters of the United States, but Doyle was injured nonfatally beyond such waters, off the coast of Grand Cayman Island. Whether someone in the position of Doyle's wife may recover loss-of-consortium damages is an open question in this circuit. Because we are confronted with an issue of first impression, we must continue the development of general maritime law "in the manner of a common law court." *Exxon Shipping Co. v. Baker,* 128 S. Ct. 2605, 2619 (2008); *see Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 360-61 (1959).

In exercising this authority, we heed the policy choices made by Congress. "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 24 (1990). Where there is no recognized claim under general maritime law, as there was in *Townsend,* an admiralty court should look to legislative enactments governing closely related claims for policy guidance. *Id.* at 27. After reviewing the relevant policy pronouncements by Congress, we conclude that allowing

recovery for loss of consortium here would give rise to two serious disparities between general maritime law and legislative policies. These anomalies counsel against recognizing a right to recovery.

First, the spouses of those injured nonfatally beyond state territorial waters would be treated differently than the spouses of those injured fatally. Congress enacted the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 30301 *et seq.*, to provide a remedy in admiralty for wrongful deaths occurring more than three miles from the shore of the United States. *Id.* § 30302. Under DOHSA, a decedent's survivors may recover only for pecuniary loss; damages for loss of society are not available. *Id.* § 30303. The Supreme Court has held that DOHSA provides the exclusive measure of damages in wrongful-death actions arising beyond the three-mile limit. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 623 (1978). Accordingly, the spouses of those injured fatally beyond that limit have no claim to loss-of-consortium damages. To allow recovery of such damages by the spouses of those injured *nonfatally* in the same waters would thus give rise to a significant anomaly. Indeed, the Court confronted just such a disparity in *Alvez,* and extended the holding of *Gaudet* to avoid it. Five Justices agreed that "there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society." *Alvez,* 446 U.S. at 281 (plurality opinion); *see id.* at 286 (Powell, J., concurring in judgment) ("Since I see no rational basis for drawing

a distinction between fatal and nonfatal injuries, I join in the judgment of the Court."). *Alvez* rejected a disparity between fatal and nonfatal injuries *within* territorial waters, and there is no reason to think that a disparity of that kind *beyond* such waters is more acceptable.

Second, if the spouses of injured nonseafarers like Doyle could recover loss-of-consortium damages on claims of negligence, then their rights under general maritime law would be greater than the rights of the spouses of injured seamen under the Jones Act. Although the Jones Act provides an action in negligence for injury to seamen, it does not authorize recovery by the seaman's spouse for loss of consortium. *See Miles,* 498 U.S. at 32. It would be odd if the relief available to the spouse of a nonseafarer were more expansive than that which Congress has afforded the spouse of a seaman. After all, the principles of maritime law have always included "a special solicitude for the welfare of seamen and their families." *Id.* at 36; *see also Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 387 (1970) (noting the development under maritime law of "a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages"). There is no reason to believe that Congress meant to place the spouses of injured seamen in a worse position than the spouses of injured nonseafarers. *Cf. Igneri,* 323 F.2d at 267 ("We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse

of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore.").

Given the value of uniformity recognized in *Miles*, 498 U.S. at 33, we agree with the Fifth and Ninth Circuits that general maritime law does not allow recovery of loss-of-consortium damages by the spouses of nonseafarers negligently injured beyond the territorial waters of the United States. *See Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1408 (9th Cir. 1994); *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119, 122-23 (5th Cir. 1994). It may be argued in reply that this holding creates an anomaly of its own. Under the rule we establish here, Anne Doyle may not recover loss-of-consortium damages, because her husband was negligently injured in waters beyond our nation's territorial sea. But under the rule set forth in *Alvez* (assuming that rule is not limited to the wives of harbor workers), she would have been able to recover for loss of consortium if the accident had occurred within territorial waters. This kind of disparity, however, already exists in maritime law: Loss-of-consortium damages are available under *Gaudet* when a wrongful death occurs in territorial waters, but not under *Higginbotham* and DOHSA when the death occurs on the "high seas." *See Higginbotham*, 436 U.S. at 624 & n.20. We therefore conclude that our holding best coincides with the congressional policies reflected in DOHSA and the

Jones Act, as well as the Supreme Court's development of general maritime law.

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For these reasons, the judgment of the district court is affirmed in part and reversed in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL DOYLE and ANNE DOYLE, Plaintiffs, v. LELAND GRASKE, Defendant.	8:05CV21 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the court for resolution after a trial to the court from March 31, 2008 to April 8, 2008. This is an action in admiralty for damages for personal injuries in connection with a boating accident that occurred in Grand Cayman Island on October 31, 2003. Plaintiffs allege negligence by defendant Leland Graske in the operation of the boat. This is a trial to the court.

I. Findings of Fact

A. The Accident

The evidence adduced at trial establishes the following. The Doyle and Graske families are longtime friends. In October of 2003, Daniel Doyle and his wife, Anne, visited Graske and his wife, Leslie, at the Graske's condominium in the Cayman Islands.

Leland Graske owns a 14-foot Caribe inflatable boat for recreational purposes in the Cayman Islands.

See Trial Exhibit ("Tr. Ex.") 1, replica drawing of a Caribe 14-foot boat; Tr. Exs. 2-15, photographs of boat. The boat has seating for six people and is rated for a float capacity of six adults. Tr. Ex. 2-15, 205, photographs of boat; Tr. Ex. 18, Caribe owner's manual, and testimony of Leland Graske. In the boat, there is forward-facing seating for two aft, two midship, and rear-facing seating for two on a cushion in the bow. *Id.* The bow cushion seating is approximately four to five inches below the top of the inflated sides (gunnel) of the boat.[1] Tr. Ex. 221, photograph. The aft and midship seats are angled down from front to aft. Tr. Exs. 209, 211, photographs. The bow seat is flat. Tr. Ex. 221, photograph. All the seats measured from the top of the seat cushion are approximately 16" above the deck (the bow seat being 13.5"). Tr. Exs. 211, 216, photographs. The aft seat has a back rest. Tr. Ex. 219, photograph. The midship seat has a back rest for the starboard side only. Tr. Ex. 220, photograph. The bow seat has no back rest, but it does have a back stop of approximately 5 inches. Tr. Ex. 221, photograph. There are gunnel hand-hold straps (hand straps) for the midship and bow passengers. Tr. Exs. 206, 289, photographs. The boat was equipped with an outboard 70-horsepower two-cycle engine manufactured by Yamaha. Tr. Ex. 207. A 70-horsepower engine is the maximum

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[1] A gunnel is the outer side or hull of the boat. In this case the tube is the gunnel. *See* Testimony of Herbert Angell.

horsepower engine approved for use on the craft. Tr. Ex. 18, Caribe owner's manual at 4.

The evidence adduced at trial shows that the boat had been repaired by a local mechanic employed by Kirk Marine a few days before the accident that is the subject of this action. Leland Graske testified that the steering mechanism had been frozen. In the repair, Kirk Marine reported that its mechanic had disassembled and lubricated the steering mechanism. The engine had been used for approximately two hours in the time between the repair and the accident. During those two hours the engine was used at idle or low rpms to travel close to shore.

Leland Graske testified that he has been a boat owner and operator for most of his adult life. Doyle had limited experience as a boat owner and operator. He owned a boat for use on the Missouri River for several seasons and he also owned a small fishing boat that he used infrequently. Graske also testified that he believes that Daniel Doyle is an above-average risk-taker. He would rate Doyle's risk-taking as 8 on a scale of 1-10, ten being the highest.

The testimony at trial establishes that on October 31, 2004, at approximately 10:30 a.m., Daniel Doyle, Leland Graske and Graske's friend, Robert (Bobby) Van Hook went fishing in Graske's Caribe inflatable boat. Graske testified that he swam to the boat's mooring and brought the boat back to shore, where Doyle and Van Hook boarded the boat with a cooler, a fishing tackle box, and fishing rods. No one

was wearing a life jacket. There is considerable disagreement in the testimony with regard to the seating of the passengers in the boat.

Doyle testified that he has little or no recollection of the event. Leland Graske testified that he was driving the boat and was standing or sitting behind the midship starboard side steering panel, which rises above the boat's gunnel level and has a wind screen.[2] Graske testified that he recalls Van Hook sitting in the midship starboard side seat holding a diagonal hand strap located on the inside of the port inflatable tube. Graske consistently maintains that Daniel Doyle was seated on the starboard inflated tube, holding at least one hand strap and with his feet between the midship seat and the bow cushion seat. He testified that he does not believe Doyle changed position until he was ejected from the boat.

Bobby Van Hook testified that he was seated on the port side of the midship seat, the fishing equipment was on the starboard side and the tackle box and cooler were on the deck in front of the midship seat. He stated that the fishing rods were propped between the bow and the midship seating area, slanting upward toward the stern, on the starboard side. (Tr. Ex. 1). He testified that Graske was seated, not standing, behind the steering wheel.

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[2] Starboard is the right side of the boat when facing forward to the bow of the boat and port is the left side of the boat. *See* Testimony of Herbert Angell.

Van Hook also testified that he believes Doyle was initially seated on the port side inflated tube, toward the bow, adjacent to or above the bow seat. Van Hook testified that as the boat accelerated, Doyle moved to a fully-seated position in the bow seat on the port side of the seat. It was from this position that the plaintiff was ejected from the boat. He does not recall Doyle holding any hand straps.

Graske testified that after the occupants were on board, he steered the boat, at idle speed, through the no-wake zone. He testified that he announced to the passengers that the boat was about to accelerate by saying words to the effect "Here we go." He then increased speed to put the boat on plane.[3] The boat came on plane and, as the defendant was adjusting the trim, the steering linkage disengaged. The motor swung violently clockwise causing the boat to turn hard to the port side.

Doyle was ejected from the boat over the starboard side. The underside of the boat struck him on the right side of his back and the back of his head. Graske testified that he immediately put the boat in neutral or killed the motor. He and Van Hook located Doyle in the water. Graske was able to steer the boat by holding the engine's drag link in one hand and the

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[3] "On plane" means that the boat is going fast enough that the hull of the boat is skimming along the top of the water rather than displacing the water. *See* Testimony of Herbert Angell.

throttle in the other. Doyle was hurt, but coherent. He apparently did not lose consciousness, nor was he bleeding. Graske and Van Hook brought Doyle back to shore. Once on shore, they helped him walk to the edge of the beach. They called an ambulance which took him to the Cayman Islands Health Services Authority Hospital in Georgetown, Grand Cayman ("Georgetown Hospital").

B. The Medical Evidence

At Georgetown Hospital, the emergency room staff diagnosed Doyle with fractures of multiple right posterior ribs, a right flail chest,[4] a right hemothorax, a right pnuemothorax, right posterior chest surgical emphysema, and multiple minor lacerations to his posterior skull, right arm and right shoulder. *See* Tr. Ex. 37, Georgetown Hospital medical records at 1-2, 36. On admission, Doyle had no adverse neurologic signs or symptoms. *Id.* at 2, 36-37.

Doyle was treated with insertion of a chest tube and transferred to intensive care. *Id.* at 3-5. On the third day of his hospital stay, November 2, 2003, at 4:15 p.m., Georgetown hospital staff witnessed a cardiopulmonary arrest. *Id.* at 49. Cardiopulmonary resuscitation was initiated immediately and the code team arrived within five minutes. *Id.* Doyle was intubated and was placed on a ventilator by 4:30 P.M.

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[4] A flail chest describes a chest cavity in which the ribs do not provide enough rigid support for effective inspiration.

Id. Thereafter, the plaintiff was sedated, medically paralyzed and kept on a ventilator. *Id.* at 27-29. On November 4, 2003, a chest x-ray showed bilateral changes consistent with acute respiratory distress syndrome. *Id.* at 32-33. Later that day, Doyle was transported by air to the United States for treatment. *Id.* at 34-35. Originally, Doyle was to have been transferred directly to University of Nebraska Medical Center ("UNMC") in Omaha, Nebraska, but, because the respirator in the air ambulance was malfunctioning, Doyle was instead transported, along with Georgetown Hospital's ventilator, to Memorial Regional Hospital in Hollywood, Florida ("Hollywood Hospital"). *Id.* at 35; Tr. Ex. 38, Hollywood Hospital medical records.

Doyle was admitted in critical condition to the Hollywood Hospital at 2:37 a.m. on November 5, 2003. Tr. Ex. 38, Hollywood Hospital records at 60. On admission, his injuries were noted to be "a flail chest involving the right hemithorax with multi rib fractures, essentially involving the entire right hemithorax."[5] *Id.* at 24. He was diagnosed with fractures of all eleven right posterior ribs and his

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[5] A hemithorax is one side of the thorax, which is "[t]he upper part of the trunk between the neck and the abdomen; it is formed by the 12 thoracic vertebrae, the 12 pairs of ribs, the sternum, and the muscles and fasciae attached to these; below, it is separated from the abdomen by the diaphragm; it contains the chief organs of the circulatory and respiratory systems." Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 177000 & 408370).

right scapula.[6] *Id.* at 25-27. Diagnostic tests also showed underlying pleural effusion and a minimal anterior pnuemothorax.[7] *Id.* at 28. On November 7, a tracheostomy was performed to provide a permanent airway for his continued ventilation.[8] *Id.* at 3, 62. A gastrostomy feeding tube ("G-tube") was also surgically placed that day. *Id.* at 3. Doyle later developed respiratory insufficiency and was transported to UNMC on November 14, 2003. *Id.*

Doyle was admitted to UNMC at 9:46 p.m. on November 14, 2003. Tr. Ex. 39, UNMC records at 37. Doyle's attending physician at UNMC was Dr. Joseph C. Stothert, M.D., Ph.D., the Medical Director for Trauma at UNMC, a surgeon and a Ph.D. Pulmonary Physiologist. Tr. Ex. 79, Stothert curriculum vitae; Tr.

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[6] The scapula is "[a] large triangular flattened bone lying over the ribs, posteriorly on either side, articulating laterally with the clavicle at the acromioclavicular joint and the humerus at the glenohumeral joint. It forms a functional articulation with the chest wall, the scapulothoracic articulation." Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 364860).

[7] A pleural effusion is increased fluid in the plural space. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 125240). The pleura is the serous membrane enveloping the lungs and lining the walls of the pleural cavity. *Id.* at 321290. A pnuemothorax is the presence of free air or gas in the pleural cavity. *Id.* at 323250. External compression of the lung by a pneumothorax or pleural effusion can lead to a pulmonary collapse. *Id.* at 85710.

[8] A tracheostomy is an operation to make an opening in the trachea. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 414210).

Ex. 39, UNMC records at 6. He was discharged on November 19, 2003. Tr. Ex. 39, UNMC records at 38. It was noted in Doyle's discharge summary that he had been admitted on a ventilator, had a feeding tube in place, and had suffered a closed head injury that left him confused and agitated at times. *Id.* at 37. During his hospitalization, Doyle was weaned from the ventilator and his condition improved to allow him to eat some regular food. *Id.* At the time of his discharge, he was able to speak well and to recognize family and friends. *Id.* Doyle received occupational and physical therapy consultations for ambulation, strength, and to learn how to perform the activities of daily living. *Id.* He was assessed for inpatient rehabilitation by a physical medicine and rehabilitation specialist, Dr. Jason Schave. *Id.* at 40. Dr. Schave diagnosed Doyle with anoxic encephalopathy with coordination difficulties and confusion, impaired activities of daily living and mobility, dysphagia,[9] and agitated behavior. *Id.* Doyle was referred to Methodist Hospital Acute Rehabilitation Center ("Methodist Acute Rehab") for inpatient rehabilitation. *Id.* at 37.

Doyle underwent a long course of physical and neurological rehabilitation. Tr. Ex. 40, Methodist Acute Rehab medical records at 14. He was hospitalized at Methodist Acute Rehab from

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[9] Dysphagia is difficulty swallowing. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 122190).

November 19, 2003, to December 5, 2003, for medical care and occupational and physical therapy as part of a comprehensive brain injury rehabilitation program. *Id.* Doyle's treating physician there was Dr. Jude Cook, M.D., an internist and physical medicine and rehabilitation specialist (also referred to as a physiatrist). *Id.* at 10; Tr. Ex. 107, Cook curriculum vitae.

At the time of his admission, Doyle had right rib fractures, a right clavicle fracture, a right scapular fracture, a G-tube placed, a tracheostomy, he was agitated and had symptoms of dysphagia. Tr. Ex. 104, Trial Deposition of Jude Cook, M.D. ("Cook Dep.") at 33. Dr. Cook diagnosed traumatic brain injury and anoxic encephalopathy.[10] *Id.* at 34. A neurological examination revealed a brain injury rated level IV on the Rancho Los Amigos scale, a scale that helps medical professionals determine a person's level of impairment secondary to brain injury.[11] *Id.* at 6. A person with a Rancho level IV brain injury demonstrates poor memory, insight and judgment, lack of awareness of his physical ailments and environment and agitation. *Id.* at 11. Dr. Cook did not

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[10] Encephalopathy is any disorder of the brain. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 129640). Anoxia is absence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues. *Id.* at 24700.

[11] *See also* Rancho Los Amigos National Rehabilitation Center website ("Rancho Los Amigos website"), http//www.rancho.org/patient_education/cognitive_levels.pdf

diagnose Doyle with depression, but testified that people in a Rancho level IV of brain injury often lack the awareness of their environment or personal health that would lead them to be depressed. *Id.* at 11. Dr. Cook also found that Doyle's cerebellar functioning, which relates to fine motor control and coordination, was slow but intact. *Id.* at 13. Dr. Cook established goals of brain injury recovery, education of the patient and his family regarding brain injury issues, improving Doyle's mobility to a standby assist level, improving his activities of daily living and his swallowing to an ultimate goal of removal of his tracheostomy. *Id.* at 14-15.

During the term of the hospitalization, Doyle's rib fractures resolved, his ability to swallow improved, and his tracheostomy was removed. Tr. Ex. 40, Methodist Acute Rehab medical records at 14. Dr. Cook's discharge summary notes that during the hospitalization Doyle's cognition slowly improved from a Rancho level IV to a near Rancho level VI at the time of his discharge.[12] *Id.* Significantly however, Doyle still had a gastronomy tube, mild agitation and

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[12] Rancho level VI is labeled "Confused-Appropriate." At that level, "a patient shows goal-directed behavior, but relies on cueing for direction. He can relearn old skills such as activities of daily living, but memory problems interfere with new learning. He has a beginning awareness of self and others." *See* Rancho Los Amigos website, http//www.rancho.org/research_pted.htm

reactive depression secondary to his head injury. *Id.* at 13.

Doyle was followed on an outpatient basis by Dr. Cook. Tr. Ex. 104, Cook Dep. at 25. In May 2004, Dr. Cook reported slow improvement. *Id.* Cook examined Doyle again in November 2004, and noted that test results were consistent with a moderate to severe brain injury. Cook Dep. at 29. When Doyle was last seen by Dr. Cook in May 2006, he was neurologically the same as he had been in the previous examination, but continued to be depressed. *Id.* at 42. Based on Dr. Cook's examination of Daniel Doyle, Doyle's history and Dr. Cook's collaborative consultations with other physicians and health providers, Dr. Cook testified that he believed to a reasonable degree of medical certainty that Daniel Doyle is permanently disabled and unemployable. *Id.* at 30-31.

After his release from Methodist Acute Rehab, Doyle was referred to Dr. Richard L. Bowles, Psy.D., a rehabilitation neuropsychologist, for testing to determine the extent of impairment from the brain injury. *Id.* at 18-19; Tr. Ex. 42, Neuropsychological Evaluation dated March 1, 2004 ("Bowles first report") at 1; Tr. Ex. 67, Deposition of Richard L. Bowles, Psy.D., ("Bowles Dep.") at 5. Dr. Bowles diagnosed dementia secondary to acquired brain injury and depressive reaction by history. Tr. Exs. 42, Bowles first report at 7; 104, Cook Dep. at 19; Bowles Dep. at 38. Dr. Bowles reported considerable impairment in numerous cognitive areas including attention/concentration, processing speed, memory and

executive functioning and problem solving. Tr. Ex. 104, Cook Dep. at 23; Tr. Ex. 42, Bowles first report at 6. Test results indicated a moderately severe degree of overall impairment. Tr. Ex. 42, Bowles 2004 Report at 7. Bowles recommended 24-hour supervision. *Id.* At the time of the first exam, Dr. Bowles expected Doyle to recover further over the following several months to a year. *Id.* Dr. Bowles reexamined Doyle in July 2004. Tr. Ex. 43, Neuropsychological Evaluation dated March 1, 2004 ("Bowles second report") at 2. The second neuropsychological examination showed a moderate to severe brain injury. *Id.* at 6. Test results were generally consistent with those obtained in the earlier testing, but there were significant declines in some areas. *Id.* at 4, 6. Doyle continued to exhibit deficits in short term memory, basic and complex attention as well as decreased vigilance and slowed processing of information. *Id.* at 6. Given Doyle's relative lack of progress, Dr. Bowles was concerned about the prognosis for recovery of cognitive function. *Id.*

Doyle's last neuropsychological evaluation was performed by Dr. Bowles in 2005. Tr. Ex. 44, Neuropsychological Evaluation dated June 23, 2005 ("Bowles third report") at 2. Doyle's scores on various tests reflected little change from his 2004 testing. *Id.* at 7. Dr. Bowles found Doyle's status to be incompatible with the ability to operate a motor vehicle safely. *Id.* Dr. Bowles testified by deposition that Doyle's physical condition is at its maximum improvement. Tr. Ex. 67, Bowles Dep. at 50-52. Dr.

Bowles stated that Doyle's psychological condition may be improved with different therapies, but it too is static. *Id.*

At present, the record shows that, although he is within the average range of global intellectual functioning, Doyle has deficits in verbal and visual short-term memory, concentration and complex attention, processing word speed and categorical fluency as well as diminished motor speed and coordination in both hands. Tr. Ex. 44, Bowles third report at 7. He has little motivation, questionable judgment and lacks awareness of safety. *Id.* Doyle continues to need ongoing supervision as a result of the questionable reliability of his judgment and his lack of awareness of safety-related issues. *Id.* His signs and symptoms are consistent with a moderate to severe brain injury. *Id.* Dr. Bowles also stated that Doyle's status was not compatible with the ability to operate a motor vehicle safely. *Id.* Dr. Bowles reports that he expects Doyle's cognitive status to remain stable into the future, barring a stroke or other brain injury. *Id.* at 7.

On his treating physician's recommendation, Doyle received outpatient therapeutic services from Quality Living, Inc., in Omaha from 8/2004 to 3/2005. Quality Living records show that he did not make much progress there with the therapy. Tr. Ex. 41, Quality Living, Inc.'s medical records at 21. Other records show that Doyle's cognitive level improved from a Rancho level IV (confused and agitated) to a level VI (confused and appropriate). Tr. Ex. 46, Giiter records at 7; *see* also Rancho Los Amigos website,

http//www.rancho.org/patient_education/cognitive_levels.pdf.[13]

At the present time, Doyle is being treated by his family physician, an internist, Dr. Michael F. Giiter. Tr. Ex. 46, Giiter medical records. Dr. Giiter's notes indicate that Doyle has diagnoses of reactive depression and decreased mental status secondary to brain injury. *Id.* at 49. Doyle is also being treated by a psychiatrist, Dr. Rodney L. Nitcher, D.O., Tr. Ex. 45, Nitcher medical records. Dr. Nitcher has expressed the opinion that Doyle's psychiatric condition is chronic and that Doyle needs 24-hour supervision and cannot live alone. Tr. Ex. 288, Allison questionnaires at 3; Tr. Ex. 24, Allison Supplemental Life Care Plan at 2.

All of Doyle's treating physicians agree that he is permanently and totally disabled. Dr. Cook testified to his opinion that Doyle suffered a traumatic brain injury from his boating accident as well as an anoxic encephalopathy due to subsequent events. Tr. Ex. 104, Cook Dep. at 35. All of the doctors agree that his condition relates to an injury sustained as a result of the boating accident described above. *See* Tr. Ex. 78, Report of Dr. Joseph C. Stothert at 1 (noting "the original injury on October 31, 2003 caused a deterioration in Mr. Doyle's respiratory status leading to an

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[13] Rancho level VII is theoretically the highest level a thinking-impaired patient can achieve short of full recovery. *See* Rancho Los Amigos website, http//www/rancho.org.

anoxic event" and "the injury to his chest and subsequent events caused the brain injury that Mr. Doyle currently suffers from"). The physicians further agree that it is unlikely Doyle sustained the closed head injury at the time of accident, but is more likely that he had an anoxic hypoxic event during his hospital treatment for the injuries he sustained during the boating accident.[14] Tr. Ex. 104, Cook Dep. at 34. No doctor is of the opinion that the anoxic hypoxic event is unrelated to the boating accident.

C. Duty of Care

At trial, the plaintiffs presented the testimony of Herbert Charles Angell, Nebraska State Boating Law Administrator, with respect to the duty or standard of care for the operator of a boat. *See also* Tr. Ex. 58, Herbert Angell curriculum vitae. Angell testified that he has investigated more than a thousand boating accidents. He reviewed several boating safety publications. *See* Tr. Ex. 89, United States Coast Guard ("USCG") inland rules for navigation; Tr. Ex. 92, 2007 Nebraska boating guide. He stated that his review of the evidence in this case led him to conclude that Doyle had been seated on the top of the tube, or

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[14] Anoxia is absence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues. It is to be differentiated from hypoxia, which is a decrease below normal levels of oxygen in inspired gases, arterial blood, or tissue, short of anoxia. Stedman's Medical Dictionary (27th ed. 2000) at [on Westlaw] Stedmans 24700 & 196860

gunnel, on the starboard side toward the bow. He testified that, in his opinion, Graske should not have allowed Doyle to sit on the starboard right gunnel or tube and that to have done so violated safe boating practices. He testified that even if Doyle had been seated in the bow seating area at the front of the boat, facing backward, Graske's operation of the boat would have been unsafe and "negligent." He testified, assuming that Van Hook's version of events were true, that Doyle was at first seated on the tube, but sometime in the period of time between the boat's proceeding at no-wake speed and coming up on plane, Doyle assumed a position on the bow seat and was told by both Van Hook and Graske to hold on, but did not do so, it would have been an unsafe boating practice for Graske to proceed. Angell also testified that at planing speed the only safe seating for anyone other than the operator would be in the middle seat facing forward. He stated that the distance between the cushioned area and the top of the tube would not provide an adequate backrest to allow safe seating in the bow cushion seating area.

Michael Sampsel, a mechanical and marine engineer, also testified as an expert witness on behalf of the plaintiffs. He testified that based on the evidence he had reviewed, the hull planing speed of a boat similar to Graske's is estimated to be less than 30 MPH. He further testified that the cushion on the bow of the boat – on which Van Hook claims Daniel Doyle was seated – is not designed to be a seat when

the boat is "underway," or going faster than a fast idle.

Paul J. Larson, a marine accident investigator, marine surveyor, consultant and retired Commander in the USCG, testified that he also investigated the accident. Tr. Ex. 54, Larson curriculum vitae. He reviewed the deposition testimony in this case as well as various boating safety regulations, guides and statistics. *See* Tr. Ex. 87, USCG requirements for recreational boats; Tr. Ex. 88, USCG boating statistics; Tr. Ex. 93, California Boating Law; Tr. Ex. 94, Federal Safety Tips. Based on his knowledge and investigation of this and numerous other "fall overboard" type accidents, he testified that, in his opinion, it was "negligent" for Graske to have allowed Doyle to sit on the tube of the boat. He testified that the operator of a boat is responsible for all aspects of safe operation of the vessel. In his opinion, a sudden mechanical failure caused the accident, but the unsafe boating by Graske in allowing Doyle to remain seated on the tube while the boat was underway was the cause of Doyle's fall overboard. Also, he testified that a shipowner has a nondelegable duty to maintain a ship in a seaworthy condition. Larson also testified that if a passenger were sitting on the tube of the boat, holding the hand straps would not have prevented ejection from the boat. He further testified that, even if the testimony of Bobby Van Hook were credited and Doyle moved from the tube to the bow cushion seat after the vessel was underway and was warned to hold a hand strap, but did not, Graske's

operation of the boat would have been in violation of safe boating practices. Larson also stated that the bow cushion area would not have been a safe seat while the boat was underway at planing speeds.

The defendant's expert, Robert MacNeill, a naval architect, human factors engineer and Coast Guard Licensed Captain, also testified at the trial. Tr. Ex. 261, Robert MacNeill curriculum vitae. He testified that he has investigated or reviewed investigations of hundreds of boating accidents in connection with consulting provided to the Coast Guard with respect to the implementation of the federal boat safety act. He further stated that in preparation for testimony in this case he physically inspected and operated Leland Graske's inflatable boat. Tr. Ex. 202-227, photographs of boat, Tr. Ex. 260, Supplemental Report of Robert MacNeill (received for limited purpose of measurements). He testified that, in his opinion, there are occasions when it would be safe to allow a passenger to sit on the tube of an inflatable boat. With respect to a duty of pre-trip inspection by a boat operator, he stated that it would be sufficient for the operator to make sure that the boat was operational. He also testified that, in his opinion, any passenger who was seated in the front of the boat and was not holding on to a hand strap would have been thrown out of the boat in a sudden turn. He also testified that he knew of no rules, regulations, or standards that would require a boat operator to insist that a passenger hold a handhold.

D. Damages

Daniel Doyle's wife, Anne, and his children also testified at the trial. They testified with respect to Doyle's abilities and disabilities and to differences in his personality since the accident. Anne Doyle also testified to the differences to her life and to the Doyles' marriage since the accident.

The parties have stipulated that the Doyles have incurred medical bills to date in the amount of $252,517. Filing No. 295, Ex. A, Stipulation, Tr. Ex. 22, Summary of Medical Bills. The evidence shows that prior to the accident, Daniel Doyle was employed as a mechanical engineer earning between $52,692 and $57,301 per year for the years 1999 to 2002. Tr. Exs. 81-85, Income Tax Returns, 1999-2003. He would have been expected to continue working until he reached age 66, his Social Security full retirement age. Tr. Ex. 255, John Scarborough Supplemental Economic Loss Analysis at 2. There is no evidence that he would have been inclined to retire any earlier.

Both parties submitted evidence on the cost of providing medical and supportive care to Doyle in the future. According to life expectancy tables, Doyle would be expected to live to age 79. Tr. Ex. 80, Standard Ordinary Mortality Table; Tr. Ex. 25, Report of Kent Jayne at 8. The plaintiffs' expert, Kathie Allison, a certified life care planner, presented three alternative life care plan scenarios. Tr. Ex. 23, Allison Life Care Plan; Tr. Ex. 24, Supplement to Life Care Plan. Option I would provide additional

assistance for Doyle to remain in his home, such as help with home maintenance and cleaning, as well as a household attendant for 111.6 hours per week, and would cost $66,811 to $67,051 annually, in today's dollars. Tr. Ex. 23 at 10; 24 at 4. Option II would provide for live-in care for Doyle and would cost between $102,500 and $109,500 annually, at the rate for care of $280 to $300 per day. *Id.* Option III would provide supportive living at a facility designed for brain-injured people, such as Quality Living, Inc., and would cost $82,125 annually. *Id.* Under each option, Ms. Allison's life care plan would also include additional sums for physicians' visits, medication and supplies, physical and occupational therapy, equipment, and mileage, at an approximate cost of between $2,434 and $3,049 per year. *Id.* at 4. Ms. Allison estimates the lifetime cost for Doyle's care under Option I would be $1,830,876 to $1,866,462; under Option II would be $2,765,834 to $2,978,611; and under Option III would be $2,232,140 to $2,261,386 in today's dollars. *Id.*

William H. Burke, Ph.D., a certified rehabilitation counselor and Board-certified disability analyst and rehabilitation consultant, testified on behalf of the defendant. Tr. Ex. 258, William Burke, Ph.D. curriculum vitae. He stated that he had reviewed Doyle's medical records, physicians' recommendations, Ms. Allison's life care plan and the depositions and testimony in this case. He concluded that Daniel Doyle has a combination of cognitive and higher cognitive deficits that interfere with his ability to live

independently. He agreed that Doyle needs someone available for round-the-clock care. He also presented several options for Doyle's continued care. Tr. Ex. 257. Each included costs for medical care, equipment and medication.

Dr. Burke's first option for Doyle's supportive care is based on the assumption that Mrs. Doyle would continue to care for Daniel Doyle in his home and that she preferred to do so. *Id.* at 13. Dr. Burke testified that this option contemplates the utilization of a community living coach for 40 hours per week to enable Doyle to perform work-type activities in the community. Dr. Burke estimated that the community living coach services could be provided for $23,712 per year. *Id.* at 15.

Option II assumes that Mrs. Doyle would not be available and would provide Doyle with a live-in personal care attendant and homemaker along with household production assistance and case management to replace those services provided by his wife. *Id.* Dr. Burke estimated that the services of a live-in personal care attendant could be obtained for approximately $50,219 per year, including room and board. *Id.* at 16.

Option III provides for placement of Doyle in an assisted-living facility. Dr. Burke estimated that this option would cost between $28,416 and $49,320 per year. Dr. Burke's calculations do not include any compensation for Mrs. Doyle or other family members in caring for Doyle. Dr. Burke testified that he

envisioned the assisted-living option to be utilized when Doyle was elderly.

The plaintiffs' economic expert witness, Kent Jayne, M.A., M.B.A., a vocational Economic Consultant and Rehabilitation economics specialist, calculated the value of Doyle's lost earnings as of July 2007 to be $152,826. *See* Tr. Ex. 25, Report of Kent Jayne at 8; Tr. Ex. 61, Kent Jayne curriculum vitae. He calculated that the present value of Doyle's diminished earning capacity from July 1, 2007 to his retirement age of 66 is $817,112. *Id.* The defendant's economic expert, John Scarbrough, Ph.D., calculated Doyle's lost future wages according to a worklife expectancy of 12.6 years from the age of 49, to account for the likelihood that Doyle would not live to the age of 66, or would have been out of the workforce at times. Tr. Ex. 255, Scarbrough Supplemental Report at 4. He also factored the projected cost of health insurance and retirement benefits into his future earnings analysis and also calculated the present value of Doyle's lost earnings before and after a deduction of Doyle's Social Security disability benefits. *Id.* Dr. Scarbrough's analysis resulted in a total net economic loss for past and future wages in the amount of $886,696 (present value), if disability payments were deducted, and of $1,059,785, without the deduction of disability payments.

Dr. Scarbrough also analyzed the future cost of medical care and supported living for Doyle and calculated present value under both Ms. Allison's Life Care Plan and the plan proposed by Dr. Burke. Tr.

Ex. 255, Scarbrough Supplemental Report at 4. According to Dr. Scarbrough's analysis, the present value of the future costs of Doyle's care under Ms. Allison's Option I (household attendant) would be $1,580,750. *Id.* at 21, Table A.2 for Option I. The present value of the future costs of Doyle's care under Ms. Allison's Option II (live in care) would be $2,449,476. *Id.* at 22, Table A.2 for Option II. The present value of the future costs of Doyle's care under Ms. Allison's Option III (supported living) would be $1,919,934. *Id.* at 23, Table A.2 for Option III. Under the scenarios presented by defendant's expert, Dr. Burke, the present value of the future costs of Doyle's care under Option I (wife available) would be $656,762. *Id.* at 30, Table A.4 for Option I. The present value of the future costs of Doyle's care under Option II (wife not available-home care) would be $1,285,272. *Id.* at 31, Table A.4 for Option II. The present value of the future costs of Doyle's care under Option III (wife not available-facility care) would be $930,691. *Id.* at 32, Table A.4 for Option III.

II. Conclusions of Law

A. Law

This action arises under the admiralty and maritime jurisdiction of this court pursuant to 28 U.S.C. § 1333. General maritime law governs a tort claim when conditions of location and connection to maritime activity are satisfied. *Sisson v. Ruby,* 497 U.S. 358, 369 (1990). The general tort concepts of

negligence and proximate cause apply in admiralty and maritime cases. *Phillips Petroleum Co. v. Stokes Oil Co.*, 863 F.2d 1250, 1255 (6th Cir. 1988). In tort actions, courts look to the Restatement (Second) of Torts as a source of general common law principles to determine general maritime law. *See Wells v. Liddy*, 186 F.3d 505, 525 (4th Cir. 1999); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002).

In order to succeed on a claim of negligence under maritime law, a plaintiff must establish all elements of a negligence cause of action in admiralty, which are essentially the same as land-based negligence under the common law: 1) the existence of a duty of care owed by the defendant to the plaintiff; 2) the breach of that duty of care; 3) a causal connection between the offending conduct and the resulting injury, which is called "proximate cause"; and 4) actual loss, injury or damage suffered by the plaintiff. *Pearce v. United States*, 261 F.3d 643, 647-48 (6th Cir. 2001); *Hartley v. St. Paul Fire & Marine Ins. Co.*, 118 Fed. Appx. 914, 919 (6th Cir. 2004). The duty of care can be derived from "duly enacted laws, regulations, and rules; . . . custom . . . or . . . the dictates of reasonableness and prudence." *Galentine v. Estate of Stekervetz*, 273 F. Supp. 2d 538, 544 (D. Del. 2003).

As a general rule, a shipowner owes to a person lawfully aboard the vessel "the duty of exercising ordinary care, which is held to mean reasonable care under the circumstances of each case." *Urian v. Milstead*, 473 F.2d 948, 951 (8th Cir. 1973); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625,

632 (1959). Under that standard, the degree of care required must be in proportion to the apparent risk. *Muratore v. M/S Scotia Prince,* 845 F.2d 347, 353 (1st Cir. 1988). In other words, under certain situations, reasonable care may be a very high degree of care and in another situation it may be less. *Smith v. Southern Gulf Marine Co. No. 2, Inc.,* 791 F.2d 416, 421 (5th Cir. 1986). The "extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to a passenger, will determine how high a degree of care is reasonable in each case." *Mendelson v. Delaware River & Bay Authority,* 112 F. Supp. 2d 386 (D. Del. 2000).

Admiralty law also adheres to principles of comparative fault. *United States v. Reliable Transfer Co.,* 421 U.S. 397, 409 (1975); *McDermott, Inc. v. AmClyde,* 511 U.S. 202, 221 (1994). Accordingly, proportional division of liability applies in admiralty cases. *See, e.g., Phillips Petroleum Co. v. Stokes Oil Co., Inc.,* 863 F.2d 1250, 1255 (6th Cir. 1988) ("Damages in admiralty cases are generally allocated among tortfeasors based on comparative fault."). Under the maritime rule, the plaintiff's comparative negligence mitigates his damages. *Carey v. Bahama Cruise Lines,* 864 F.2d 201, 208 (1st Cir. 1988).

Admiralty law imposes joint and several liability on tortfeasors. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 273 n.30 (1979) (stating that "the general rule is that a person whose negligence is a substantial factor in the plaintiff's

indivisible injury is entirely liable even if other factors concurred in causing the injury"). Where joint and several liability is imposed, "[n]ormally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor." *Id.; see also McDermott, Inc. v. AmClyde,* 511 U.S. at 210 n.10 (noting that comparative negligence and joint and several liability are not incompatible). Joint and several liability allows a plaintiff to recover from one of multiple defendants, when plaintiff's recovery from other tortfeasors is limited by outside facts, such as a defendant's insolvency, making other defendants, rather than the innocent plaintiff, responsible for the shortfall. *McDermott,* 511 U.S. at 210 n.10. Although the damages assignable to the plaintiff's own culpability must be subtracted from whatever damages the plaintiff has proven at trial, the defendant would still be liable "in full for the remainder," even where a third-party's negligence contributed to the injuries. *See Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. at 260.

Joint and several liability applies "where there has been a judgment against multiple defendants," whereas, in admiralty law, a defendant may be liable for the proportion of fault assignable to another culpable party who was not named as a defendant. *See Id.* (*quoting McDermott, Inc. v. AmClyde,* 511 U.S. at 221).

B. Analysis

1. Duty/Breach of Duty

In making these findings the court generally credits the testimony of Doyle's treating physicians and plaintiffs' experts Angell, Larson, Sampsel, and Allison. The court also generally agrees with the opinions of the defendant's life care expert Burke. The court generally agrees with both expert economists Jayne and Scarbrough. For reasons discussed below, the court is not inclined to fully credit the testimony of defendant's expert MacNeill.

The court finds that the evidence establishes that a boat owner and operator has an undisputed responsibility for the passengers' safety and the safe operation of the boat. The court credits the testimony of Angell and Dr. Larson, supported by the boating safety regulations and guidelines admitted into evidence, that it is an unsafe boating practice to operate a vessel with a passenger seated on the gunnel or tube of the boat. The court finds that defendant Graske's conduct in the operation of the boat violated a boat operator's duty to use reasonable care under the circumstances. Significantly, the circumstances in this case involve a small boat outside the no wake zone in the ocean accelerating to bring the boat on plane.

The court finds that the totality of the evidence shows that Doyle was seated on the tube as the boat proceeded through the no wake zone. It is plausible that Doyle may have moved to the bow seating area

as the boat accelerated, but whether he did so or not does not affect the court's analysis. The court finds that Graske did not use reasonable care for the safety of his passengers under the circumstances in either event. The evidence establishes that both the tube and the bow cushion seat are positions of danger while accelerating a small watercraft on the open ocean. Similarly, whether or not Doyle was told by either Graske or Van Hook to "hold on," and disregarded the admonition, makes no difference to the court's analysis. If Doyle had disregarded such a command, it would have then been negligent for Graske to continue to accelerate knowing that Doyle was not holding the hand straps.

Graske had a duty of reasonable care under the circumstances for the safety of his passengers and the safe operation of his boat. The evidence shows that it is an unsafe boating practice to accelerate up to plane with a passenger in a position of danger. Under these circumstances, a boat operator using reasonable care would ensure that his passengers were seated in a safe position in the boat while accelerating. Graske, an experience boater, knew or should have known that his passenger was in a place of danger as long as Doyle was in the bow section of the boat and the boat was traveling at a speed sufficient to bring it on plane.

Daniel Doyle, as a passenger somewhat familiar with boating, also had a duty to use reasonable care for his own safety. The evidence shows that Daniel Doyle put himself in a place of danger and knew or

should have known that it was an unsafe boating practice to sit on the tube of the boat. He similarly should have known that it was not safe to change positions in the boat while the boat was accelerating.

Nevertheless, if Doyle were sitting on the tube, Graske's duty of reasonable care for passenger safety would have correspondingly increased in proportion to the increased danger to the passenger. Thus, Graske would have an even higher duty to a passenger sitting on the inflatable tube portion of the boat while the boat is operating at plane speeds. Any criticism that can be leveled at Daniel Doyle for either sitting on the tube or failing to hold a strap, can also be leveled at Graske for accelerating in the face of such conduct. If Doyle's conduct on the boat was unsafe, then it would be unsafe for boat's operator to continue to allow the conduct and to operate the boat in a fashion that jeopardizes the passenger's safety.

Although Mr. MacNeill's measurements are valuable to the court's analysis, the court is not inclined to credit his testimony on safety issues. Mr. MacNeill's essential expertise is in designing yachts, not small recreational boats shorter than twenty feet. MacNeill is also imbued with the laissez-faire safety attitude of most manufacturers. Although he repeatedly recognized the boat operator's duty to safely operate the boat, he was quick to point out the passenger's responsibility to act safely, failing to appreciate that contributory negligence is not a complete defense under admiralty law. Significantly, MacNeill also

admitted that anyone seated in the bow of the boat who was not holding the hand straps would have been ejected if there were a sudden turn. The court credits Mr. Larson's opinion that a passenger holding the hand straps would not be able to react quickly enough to prevent his ejection from the boat. Mr. Van Hook testified that he was surprised at how quickly the plaintiff was ejected from the boat. Were it not for his position at, or aft of, the boat's pivot point, it is likely Van Hook would have suffered the same fate. The plaintiffs' assertion that the defendant should have inspected the steering linkage to the engine prior to operating the boat is not supported by the credible evidence.

The plaintiffs' expert witnesses' expressed opinion that an inspection of the steering linkage at the engine would have been a safe thing to do is irrefutable. However, there is no evidence to support the court's imposition of a duty on a boat operator to examine this linkage before each excursion. The safety and regulatory materials received by the court support a duty only to make sure the steering is operational. On Graske's boat, operating the steering wheel prior to starting the excursion fulfills that requirement. There is no evidence that the steering mechanism was not functional prior to the instant catastrophic failure. The boat was operated from its mooring to shore and then from shore through the no wake zone and then some distance further. It is reasonable to assume the steering mechanism was operational until the drag arm became disengaged

from the steering cable extension. That event occurred while the engine was being trimmed. Trimming the engine requires tilting it to gain effective propeller purchase with the water in order to maintain plane and efficient operation.

Because the above analysis is dispositive, the court need not address the plaintiffs' other allegations of negligence.[15]

The evidence adduced in this case also establishes that other parties also owed duties to the plaintiff. The manufacturer of the boat would have had a duty to warn a purchaser, operator, or occupant of the boat that bow seating would not be safe at planing speeds or that seating on the inflatable tubes should not be allowed during operation at planing speeds. Accordingly, it appears that the manufacturer may have some liability for failure to warn that no one should be in the bow section of the boat or on the inflatable tubes when the boat operated at a speed sufficient to keep it on plane. Similarly, the mechanic who repaired the steering mechanism had a duty to repair it properly. The evidence establishes that a reasonably competent mechanic would have known that a used nylock nut should have been replaced with a new nylock nut and not reinstalled. The

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[15] The plaintiffs' claims that Graske was negligent in failing to maintain a seaworthy vessel, failing to require a life jacket, and failing to keep the boat in safe operating condition were dismissed a the close of plaintiffs' case-in-chief for the reasons stated on the record.

mechanic's employer had a duty to properly supervise the mechanic's work and to ensure that new nylock nuts were installed when replacing such nuts during repairs, especially on critical mechanisms such as steering. The medical providers involved in Doyle's care all had a duty to provide standard medical care. There is no evidence in this case, however, that the care provided by any of the health care providers was substandard. Although Dr. Stothert expressed the opinion that he would have placed Doyle on a ventilator at the outset of his hospitalization, there is no evidence that any failure to do so violated the standard of care of a reasonable medical professional. Stothert testified that he did not have sufficient records to come to such a conclusion. The extent to which these duties were breached by other parties cannot be determined by the court since the court does not have jurisdiction over them.

2. Causation

There is no sole proximate cause in this case. The issue of an intervening, superseding cause has already been addressed in the court's earlier order. *See* Filing No. 276. The evidence at trial shows that an unbroken chain of events connects the boat accident to Doyle's anoxic brain injury. Substandard medical care generally does not break the chain of

causation even if the care adds to the damages.[16] Throughout Doyle's hospital care in the Cayman Islands, at the time of his air ambulance transfer, and in the Florida hospitalization, Doyle had oxygenation problems. He would not have had this condition were it not for suffering from a flail chest caused by the fracture of all his posterior ribs in the boating accident.

The evidence shows that the accident would not have occurred absent the failure of the boat's steering mechanism, which was allegedly due to the mechanic's negligence. A sudden mechanical failure, however, is not an unforeseeable event. It is the duty of an owner and operator of a vessel to operate the boat safely in the event of such an occurrence. Assuring that passengers are properly seated in a small boat accelerating on the open ocean is fundamental to that duty. The failure of Graske to exercise reasonable care under the circumstances in the operation of his boat by accelerating while a passenger was in a position of peril caused Doyle to fall overboard in the sudden turn.

As to the defendant's assertion that the failed steering mechanism is the sole cause of the accident, the court notes that even the defendant recognized that an emergency turn is necessary when swimmers suddenly appear from beneath the water. No doubt

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[16] It is questionable that medical negligence is even cognizable in the Grand Cayman Islands.

the defendant will concede that any number of hazards that require a hard turn can occur. In that event the bow passenger will be ejected from the boat. Thus, every boating manual received by the court in this case notes the requirement that passengers should not sit on the side of the boat while it is underway. Accordingly, the court finds that the negligence of defendant Graske in the operation of the boat was a proximate and substantial cause of Daniel Doyle's injuries.

The court must next determine whether the plaintiff's own negligence also contributed to the injury and the proportionate share of the damages attributable to the plaintiff vis-a-vis defendant Graske. Given the size and power of this boat, even plaintiffs' expert expressed the opinion that anyone in the bow of this boat would be ejected in a sharp turn, and that anyone in the boat would be able to appreciate the danger of not holding on to the hand straps when the boat was at planing speed. The evidence shows that Doyle knew or should have known that it was unsafe to sit on the gunnel or tube of the boat while it was underway. Doyle violated a passenger's duty to use reasonable care for his own safety.

Doyle's comparative negligence mitigates the damages attributable to Graske to some extent. However, the court finds that, because, as the operator of the boat, Graske has a higher duty of care than his passenger, Graske remains responsible for a substantial portion of the damages.

Because there are no other party defendants to this action, the court cannot determine the extent to which the alleged negligence of other tortfeasors contributed to the Doyle's injuries, nor can it determine the proportion of the damages that should be allocated to each of those parties. Given the totality of negligence supported by the record in this case, the court finds that the plaintiff Daniel Doyle can be held accountable for no more than 10% of the total liability. The evidence indicates that the greatest share of the responsibility for the negligence in this case rests with the boat mechanic and his employer for improperly repairing the steering mechanism and for reusing a nylock nut. There may also be a claim against the manufacturer for failing to warn of the dangers to bow and gunnel riding passengers of this 14-foot boat. However, these later mentioned parties are not part of the case presented to this court and subject to its jurisdiction. Consequently, the court will leave it to the courts that do have jurisdiction over these matters to sort out any contribution or indemnification issues between the defendant and the aforementioned potential tortfeasors. Accordingly, with respect to the overall liability of all potential tortfeasors for the injuries Doyle sustained in the boating accident, the court apportions damages as follows: 10% to the plaintiff, Daniel Doyle, 90% to the defendant, Leland Graske, and the other potential tortfeasors. Plaintiff Daniel Doyle's recovery should accordingly be reduced by 10%.

3. Damages

The parties have stipulated that plaintiff Daniel Doyle incurred medical bills in the amount of $252,517. The court credits the testimony of Dr. Scarborough that Daniel Doyle's lost wages up to November 1, 2007, amount to $269,112. The evidence shows that, had he not been injured, Doyle would have worked until his full retirement age, or to age 66. The court further finds that the present value of Doyle's future lost wages until retirement is $790,646, resulting in damages for past and future lost wages in the amount of $1,059,758.

The court finds that Doyle will incur certain medical expenses in the future as a result of his injuries. The court finds, however, that there is no reasonable likelihood that physical or occupational therapy for Doyle would be effective or necessary in the future. The evidence supports a one-time award of $400 for equipment such as a cane, shower grab bars, and a shower bench.

The evidence also shows that Doyle will need round-the-clock care by a personal attendant for the rest of his life or until he may need care in a residential facility as part of his normal aging process. The option for the supportive care of a live-in caregiver would best suit Daniel Doyle's needs and conditions. The evidence shows that Doyle needs round-the-clock care. The court credits Dr. Burke's testimony that such care, furnished by a personal care assistant, along with case management, room

and board, transportation, and allowances for the costs of housecleaning, home maintenance, physician's care, and medication could be obtained for approximately $58,907 per year in today's dollars, resulting in the present value of total damages for Doyle's future medical and supportive care in the amount of $1,285,272.

Provision of the cost of live-in care will adequately account for the services of plaintiff's wife for any part she continues to play in Daniel Doyle's care. Mrs. Doyle's willingness to care for her husband is commendable, but she is not required to do so. If Anne Doyle were not available to care for Daniel Doyle, the services of a personal care attendant would be required. Accordingly, Mrs. Doyle's services should be calculated at the same rate as a personal care attendant. If Daniel Doyle should need to be admitted to an assisted-living or long-term care as he ages, he will have been compensated for his lost wages and can pay for assisted living the same as any other individual, but will have the balance of the damage award to pay for any additional supportive care that he will reasonably require as a result of his injuries. In view of the foregoing, the court finds that a special damages award of $2,597,947 to plaintiff Daniel Doyle will adequately compensate him for the injuries he has suffered in this case. This award includes his past and future lost wages, medical expenses – past and future – and the cost of his future supportive care.

The evidence also supports a substantial award of compensatory damages to Daniel Doyle for pain and suffering and loss of enjoyment of life and to Anne Doyle for loss of consortium. Testimony at trial shows that both Daniel and Anne Doyle have suffered an incalculable loss. Daniel Doyle has substantial physical and mental disabilities. The evidence shows that Daniel Doyle has enough awareness of his condition to appreciate his predicament. His injuries have left him depressed, lacking in motivation, and incapable of exercising proper judgment. He comprehends the fact that he is no longer the person he once was, but is powerless to change his situation.

As a result of Daniel Doyle's injury, Anne Doyle has essentially lost the companionship of the person she once knew. The course of her life, as well as Daniel Doyle's, was irreversibly altered by the accident. She has become a full-time caregiver for a person who is no longer the person she married. The court finds that she should be compensated for this intangible loss at a level close to that of her husband. Accordingly, the court finds that a general damages award for pain, suffering and loss of life's enjoyment in the amount of $1,000,000 is appropriate for Daniel Doyle and a general damages award of $750,000 is appropriate for Anne Doyle's loss of consortium.

Because the court finds comparative negligence by Daniel Doyle that operates to mitigate defendant Graske's liability, Daniel Doyle's total award of $3,597,947 must be reduced by 10%, or $359,794, resulting in a total damages award of $3,238,153 to

Daniel Doyle. Anne Doyle's damages are not subject to any reduction. Accordingly, in conformity with this opinion, a judgment in the amount of $3,238,153 will be entered in favor of plaintiff Daniel Doyle, and a judgment in the amount of $750,000 will be entered in favor of plaintiff Anne Doyle and against defendant Leland Graske, together with taxable court costs.

DATED this 10th day of June, 2008.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL DOYLE and ANNE DOYLE, Plaintiffs, v. LELAND GRASKE, Defendant.	8:05CV21 MEMORANDUM AND ORDER (Filed Aug. 11, 2008)

This matter is before the court on the defendant's motion to amend findings of fact and conclusions of law and judgment, or for a new trial, *Filing No. 325,* and on defendant's motion to stay execution of the judgment, *Filing No. 327.* This action for damages for personal injuries as the result of a boating accident was tried to the court under admiralty jurisdiction from March 31, 2008, to April 8, 2008. The court found the defendant liable for the plaintiffs' injuries and awarded damages to the plaintiff Daniel Doyle in the amount of $3,238,153.00 and to plaintiff Ann Doyle for loss of consortium in the amount of $750,000.00.

I. Motion to Alter or Amend

In his motion to alter or amend the findings, the defendant contends that damages for loss of consortium are not recoverable in admiralty and that, if such damages are awarded, the award should be reduced by the percentage of fault assigned to the

injured spouse. The defendant did not raise this issue at any earlier point in this litigation, which has been pending since January 18, 2005.[1] Plaintiff Ann Doyle's loss-of-consortium claim was added in an amended complaint filed on October 11, 2007. *Filing No. 171.* The defendant consented to the filing. *See Filing No. 169.* Graske never moved to dismiss the amended complaint, nor did he assert in his answer that Mrs. Doyle's claim was precluded as a matter of law. *See Filing No. 177.* In the pretrial order, the parties agreed that Mrs. Doyle's recovery of general damages, including loss of consortium, was a controverted and unresolved issue. *Filing No. 254,* Order on Pretrial Conference at 4. At trial, the plaintiffs presented evidence in support of Ann Doyle's loss-of-consortium claim without objection by defendant. The defendant never argued at trial that recovery for loss of consortium was not available in admiralty. At this late stage of the proceeding, the court is reluctant to entertain the issue. If the court were to consider the issue, however, the court would find that the defendant's position is not tenable.

It is settled that general maritime law imposes duties to avoid unseaworthiness and negligence and that fatal and nonfatal injuries caused by the breach of either duty are compensable. *Norfolk Shipbuilding & Drydock Corp. v. Garris,* 532 U.S. 811, 813-14

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[1] Defendant contends that he raised the issue by denying liability for Ann Doyle's loss-of-consortium claim. The court does not agree.

(2001); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408-09 (1970) (recognizing a wrongful-death remedy under general maritime law that supplements federal statutory remedies). General maritime law provides a cause of action for the loss of a deceased or injured spouse's "society" or consortium. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 276 (1980) (involving nonfatal injuries); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (outlining elements of recovery for wrongful death in state territorial waters, guided by state wrongful death statutes and the "humane and liberal" policies inherent in maritime law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978) (allowing recovery of loss-of-consortium damages for injuries in territorial waters); *see also Exxon Shipping Co. v. Baker*, ___ U .S. ___, ___, 128 S. Ct. 2605, 2630 n.21, 2008 WL 2511219, **19 n.21 (June 25, 2008) (affirming continuing validity of *Alvez* and citing it for the proposition that maritime law provides a cause of action for loss of consortium).

Congress has enacted statutes that also provide remedies for certain maritime injuries or deaths. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990); *see, e.g.*, the Jones Act, *46 U.S.C. § 30104 et seq.* (covering seamen in the course of employment);[2] the

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[2] "Seaman" is a term of art that has an established meaning under maritime law, incorporated in the Jones Act. *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 487 (2005). A seaman under the Jones Act is a maritime worker with a substantial employment-

(Continued on following page)

Death on the High Seas Act ("DOHSA"), *46 U.S.C. § 30301 et seq.* (covering persons killed on the high seas);[3] and the Longshore and Harbor Workers Act ("LHWCA"), *33 U.S.C. § 901 et seq.* (covering non-seaman maritime workers injured or killed in the course of employment). These statutes provide only for pecuniary relief. *See Miles,* 498 U.S. at 32.

When a statute resolves a particular issue, the general maritime law must comply with that resolution. *Garris,* 532 U.S. at 817; *Scarborough v. Clemco,* 391 F.3d 660 (5th Cir. 2004). Because loss-of-consortium damages are not available under these statutes, there can be no recovery for loss of consortium under general maritime law for an injury or death that is also covered by one of the statutes. *See Miles,* 498 U.S. at 32; *Mobil Oil Corp. v. Higginbotham,* 436 U.S. at 623 (noting that when a Congressional act "speak[s] directly to a question,

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related connection to a vessel in navigation. *Chandris, Inc. v. Latsis,* 515 U.S. 347, 373 (1995).

[3] DOHSA provides that "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." *46 U.S.C. § 30301.* DOHSA does not cover deaths resulting from incidents occurring within state territorial waters – that is, deaths resulting from incidents occurring within three miles of the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States. *See Moragne,* 398 U.S. at 395.

courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."). Thus, if a factual scenario is covered by a statute such as the Jones Act or DOHSA, "and the statute directs and delimits the recovery available under the statute," the statute will operate to limit the recovery available under the general maritime law as well. *Scarborough v. Clemco Indus.*, 391 F.3d at 667.

Nevertheless, unless Congress has prescribed a comprehensive tort recovery scheme for a class of maritime actions, admiralty remedies can be supplemented by those available under state law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210-211 (1996) (noting that Congress had passed no law prescribing remedies for the wrongful deaths of nonseafarers in territorial waters). Traditionally, state remedies have applied in maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker or person otherwise engaged in the maritime trade. *Id.* at 207. State remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action. *Id.* at 215-216. In *Yamaha*, the Supreme Court noted that the provision of a maritime cause of action for wrongful death "centered on extension of relief, not on the contraction of remedies," basing its decision on the longstanding maritime precept that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by

established and inflexible rules.'" *Id.* at 213 (*quoting The Sea Gull*, 21 F. Cas. 909, 910 (C.C.Md.1865) (No. 12,578).

Although an admiralty court should look primarily to legislative enactments for policy guidance, it "may not slough off [its] responsibilities for common law remedies because Congress has not made a first move." *Exxon Shipping Co. v. Baker*, ___ U.S. at ___, 128 S. Ct. at 2630 (exercising federal maritime common law authority to review punitive damages award under general maritime law). The propriety of damages under general maritime law falls within a federal court's jurisdiction to decide, "subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Id.* at 128 S. Ct. 2619 (involving an award of punitive damages).

None of the federal maritime statutes that would potentially limit Ann Doyle's recovery for loss of consortium apply in this case because Daniel Doyle was neither a seaman nor a maritime worker, and his injuries were not fatal so as to come within the purview of DOHSA. Accordingly, the court finds that Ann Doyle's recovery is not precluded and the defendant's motion to alter or amend the judgment will be denied.

To the extent that the plaintiff's remedies under general maritime law could be expanded or supplemented by state or foreign law, the court would be faced with a determination of which law should determine the proper measure of compensatory

damages. In an admiralty action, federal choice of law principles apply. *See Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953). Neither party has addressed this issue. Courts weigh seven factors in rendering choice-of-law decisions: place of the wrongful act, law of the flag, allegiance or domicile of the injured, allegiance of the defendant shipowner, place of contract, inaccessibility of a foreign forum, and the law of the forum. *See id.* at 583-91. Application of these factors would not seem to favor the law of the Caymen Islands, and, in any event, the defendant has not shown that Mrs. Doyle's loss-of-consortium damages would be unavailable under Cayman Islands law or any international law principles. In view of the circumstances, the court finds an award of loss-of-consortium damages under general maritime law is appropriate.

The defendant's contention that the loss-of-consortium damages award should be proportionately reduced also lacks merit. The proportional-liability rule applies only to defendants who proximate cause an injury. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 842 (1996). "A party whose fault did not proximately cause an injury is not liable at all." *Id.*

II. Motion to Stay Execution of the Judgment

Defendant Graske moves to stay execution of the judgment pending resolution of post-trial motions and pending appeal. The motion for a stay pending resolution of post-trial motions will be rendered moot by this decision. In lieu of a supersedeas bond,

defendant proposes an irrevocable letter of credit. *Filing No. 329,* Ex. A. In response, without conceding the adequacy of the letter of credit, plaintiffs contend that any letter of credit or supersedeas bond should include The Law Offices of Ronald J. Palagi, in light of the attorney lien filed in the case, and also contend that the effective date of the letter of credit should be June 10, 2008, the date of judgment. *Filing No. 330.*

Under the Federal Rules, a party is entitled to a stay as a matter of right if a supersedeas bond is posted. Fed. R. Civ. P. 62(d). Alternatively, the party may move for the court to exercise its discretion to waive the bond requirement. *Dillon v. City of Chicago,* 866 F.2d 902, 904 (7th Cir. 1988). "When determining whether to waive the posting of bond, the district court considers several criteria: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position." *Id.* Also, the district court has discretion to order a partially secured or unsecured stay if the judgment creditor's interest in ultimate recovery is not unduly endangered. *Fed. Prescription Serv., Inc. v. American Pharm. Ass'n.,* 636 F.2d 755, 760-61 (D.C. Cir. 1980).

The court is satisfied that the letter of credit from Omaha National Bank will adequately protect the plaintiffs' interest and secure the judgment. The court agrees that the Law Offices of Ronald J. Paliagi should also be protected in the letter of credit. Accordingly,

IT IS ORDERED that:

1. Defendant's motion to alter or amend the judgment is denied.

2. Defendants motion for a stay of the judgment pending appeal is granted.

3. Within ten days of the date of this order, defendant shall file an irrevocable letter of credit drawn in favor of Plaintiffs Daniel Doyle and Ann Doyle and the Law Offices of Ronald J. Palagi, effective as of the date of judgment.

4. Upon the filing of such letter of credit, execution on the judgment shall be stayed until the time for filing an appeal has expired or the appeal, if filed, is resolved.

DATED this 11th day of August, 2008.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3144

Daniel Doyle and Anne Doyle,

Appellees

v.

Leland Graske,

Appellant

v.

Jason R. Haynes, et al.,

Appeal from District of Nebraska – Omaha
(8:05-cv-00021-JFB)

ORDER

(Filed Oct. 22, 2009)

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Bye and Judge Shepherd would grant the petition for rehearing en banc filed by appellee Anne Doyle.

October 22, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

EXHIBIT

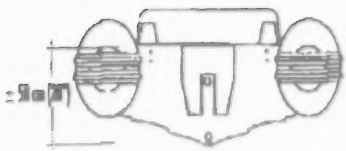
204

BEST AVAILABLE COPY

USE AND PERFORMANCE:

TRANSOM:

The transom is ±50 centimeters (20") high.



MOTOR:

Long shaft (±50 cms-20" inches) should be used, that does not exceed the maximum power recommended.
Install the motor according to the instructions given in the manual of the manufacturer

PLANING:

In order to achieve maximum performance the boat should reach its planing conditions. Planing occurs when the boat assumes its navigation equilibrium parallel to the water surface. If the weight of payload and persons aboard is well distributed, planing should be reached while increasing the speed after the start.

It is normal to loose slight bit at bow of the start, to correct move at start, the loads forward.

BOAT DOES NOT PLANE EASY:

CAUSES:

- The motor shaft is too far from the transom. This can be corrected by positioning the shaft bolt in a hole closer to the transom
- Incorrect distribution of the weights. In this case displace the weights towards the bow.

CAUTION:
Portable tanks must be removed from the boat when loading.

WARNING:
Do not exceed the maximum engine power rating stated on the certification plate attached to your boat.

Supreme Court, U.S.
FILED
FEB 25 2010
OFFICE OF THE CLERK

No. 09-888

In The
Supreme Court of the United States

LELAND GRASKE,

Petitioner,

v.

DANIEL DOYLE AND ANNE DOYLE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

JOSEPH B. MULLER
(Counsel of Record)
RONALD J. PALAGI
LAW OFFICES OF RONALD J. PALAGI, P.C., L.L.O.
3131 South 72nd Street
Omaha, NE 68124
(402) 397-5000
joe@ronaldjpalagi.com
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Daniel Doyle was ejected from the boat because Leland Graske, the owner and operator of the boat, accelerated the boat when Daniel Doyle was in a position of danger.

The question raised by this Petition is whether Graske's attempt to manipulate the judicial system, by successfully invoking admiralty jurisdiction and then taking the opposite position when he does not like the results, will be rewarded by this Court.

The other question is whether this Court will review the facts, and address the lower courts' findings that Leland Graske failed to exercise reasonable care.

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APPENDIX

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CITATIONS TO OPINIONS BELOW

In addition to the two opinions cited by Graske, the district court's denial of Defendant's Motion to Amend Findings of Fact and Conclusions of Law, or for a new trial, is also relevant to the issues herein. *Doyle v. Graske*, 2008 W.L. 3539269 (D. Neb. 2008) (Pet. App. 59-67).

STATEMENT OF THE CASE

Graske's recitation of the facts is incomplete. Without engaging in a lengthy discussion of the facts and conclusions of the trial court, here are a few of the facts and findings that Graske neglected to mention:

1) The court found that it was most likely that Daniel Doyle was seated on the tube of the boat. Pet. App. 47. Graske acknowledges that he was negligent if he accelerated the boat with Doyle seated on the tube. Pet. App. 7.

2) The court found that Graske was negligent because he accelerated when Doyle was not holding on to a strap. Pet. App. 6-9, 47-49. This finding has nothing to do with notice, or acting as an insurer.

3) There is a difference between "maximum performance", and safe operation. A boat operator's primary obligation is safety, not performance. Pet. App. 6-9, 35-38, 47-50.

4) Graske neglects to mention that he was the party that invoked admiralty jurisdiction as the basis for removal. Pet. App. 2.

BRIEF IN OPPOSITION

Graske is pursuing a novel litigation strategy. The Doyles originally filed this action in state court, but Graske removed the case to federal court and *Graske* invoked admiralty jurisdiction. Pet. App. 2. After the district court ruled in the Doyles' favor, and after the court of appeals affirmed the judgment, Graske, unhappy with the results, switched tactics.

The issue of admiralty jurisdiction was raised, for the first time, in the Petition for Rehearing before the court of appeals. This position is particularly strange because it was Graske who invoked admiralty jurisdiction in the first place. Asserting one position, and then changing positions when things do not go your way, is a tactic that has never been countenanced by this Court. See, e.g., *Davis v. Wakelee,* 156 U.S. 680 at 689, 15 S.Ct. 555 (1895); *New Hampshire v. Maine,* 532 U.S. 742, at 749, 121 S.Ct. 1808 (2001). This is not the case for this Court to change course, and say that it is acceptable for litigants to engage in this type of gamesmanship.

Graske also asserts that the lower courts are divided on the issue of whether admiralty jurisdiction extends to torts occurring in navigable waters of other countries. However, the best Graske can do is

cite three outlier district court decisions, and he has found no conflict among the courts of appeals. While Graske calls on this Court to resolve this illusory conflict, Graske fails to muster any meaningful analysis of why the decisions of the lower courts in this case were wrong. Invoking admiralty jurisdiction in this case is consistent with several decisions of this Court, prominent treatises on the subject, and decisions from several courts of appeals.

Graske's second question – whether notice of a danger is a prerequisite for imposing liability on a boat operator – spans only two and a half pages, and is likewise not worthy of this Court's review. The lower courts applied the correct standard of care. Thus, this question is nothing more than a factbound question where two courts have reached the same conclusion. Review of such a fact-specific decision is not warranted.

ARGUMENT

I. Graske's Jurisdictional Argument Violates The Doctrine Of Judicial Estoppel.

Graske argues that the district court did not have admiralty jurisdiction in this case. Pet. 5-10. However, Graske specifically invoked that jurisdiction before the district court, Pet. App. 2, and he did not raise the issue until his Petition for Rehearing in the court of appeals. Resp. App. 1-3. While jurisdictional

claims can be brought at any time, this tactic should not be rewarded by this Court.

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, at 689, 15 S.Ct. 555 (1895).

This Court has recognized that the purpose of judicial estoppel is "to protect the integrity of the judicial process," by creating a mechanism "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine,* 532 U.S. 742, at 749-750, 121 S.Ct. 1808 (2001) (citing *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, at 598 (6th Cir. 1982); and *United States v. McCaskey,* 9 F.3d 368, at 378 (5th Cir. 1993)).

It is undisputed that Graske removed this case from state to federal court invoking admiralty jurisdiction. It is also undisputed that the district court accepted Graske's argument that it possessed admiralty jurisdiction. Having the Doyles litigate the case through trial and appeal, only to have Graske question the very jurisdiction he invoked in the first place, is manifestly unfair. Such a result would amount to a perversion of the judicial process. Graske, raising this question when he previously invoked admiralty jurisdiction, is far different than a

court or other party raising the issue at this stage. The doctrine of judicial estoppel counsels against this Court's review of this issue at this late stage.

II. Three District Court Decisions Are Not Worthy Of This Court's Review.

Graske's argument is based on two fallacies:

1) That admiralty jurisdiction applies only to those torts occurring on the navigable waters of the United States, and

2) That there is a significant conflict regarding admiralty jurisdiction for torts occurring outside the territorial waters of the United States.

This Court has never held that admiralty jurisdiction over torts is limited to U.S. territorial waters. Also, while there may be some rogue district court decisions, there is no conflict among the circuit courts.

Graske acknowledges that the alleged conflict exists only among district courts. Pet. 6. In fact, Graske cannot offer one decision originating from a court of appeals holding that admiralty jurisdiction does not apply to torts occurring in the territorial waters of another country.

It is a well-known practice of this Court to decline certiorari review of a question presenting a conflict between federal district courts. See Gressman, E., et al., *Supreme Court Practice*, at p. 256 (9th ed. 2007). This practice is especially apt

here where the division among the district courts is the result of rogue decisions which have not extended into the circuits.

Graske can find only three district courts that have ruled that admiralty jurisdiction is not proper where a tort is committed in the territorial waters of another country. See, e.g., *Dunham v. Hotelera Canco S.A. de C.V.*, 933 F. Supp. 543 (E.D. Va. 1996); *St. Pierre v. Maingot*, 2002 WL 31655355 (E.D. La. 2002); *Sharma v. Skaarup Ship Management Corp.*, 699 F. Supp. 440 (S.D.N.Y. 1988). Given that admiralty jurisdiction was established the same time as the formation of our Constitution, and given that in the last 200 plus years of admiralty jurisdiction there are only three district court decisions, the better characterization is that those decisions are outliers. They do not represent a true conflict among lower courts.

III. The District Court Possessed Admiralty Jurisdiction Over This Tort.

To support his argument that admiralty jurisdiction is limited to the navigable waters of the United States, Graske cites three district court cases that rely on a quote from this Court's decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971). However, in order to make that argument, Graske, just like the district courts before him, ignores the rest of the opinion in *Victory Carriers*. They ignore the quote from Justice Story that

admiralty jurisdiction extends to " . . . the high seas, or on waters within the ebb and flow of the tide." They also ignore all of the cases cited by this Court at 404 U.S. 205, n.2.

If they had reviewed those cases, they would have found this Court's decision in *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 17 S.Ct. 572 (1897) wherein this Court held that admiralty jurisdiction extends to torts that occur in foreign waters:

> There is no difficulty about the jurisdiction of a court of admiralty in this case. . . .
>
> The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty had jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States . . . the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled both in England and in this country that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court. . . .

Id. at 166 U.S. 284-285. See also, *The Eagle*, 75 U.S. 15 (1868); *United States v. Flores*, 289 U.S. 137, 53 S.Ct. 580 (1933); Gilmore and Black, *The Law of Admiralty*, 33 (2d ed. 1975).

The circuit courts that have considered this issue have agreed with this Court and the Eighth Circuit that admiralty jurisdiction applies to cases involving

torts that occur in the waters of another country. There is no conflict among the courts of appeals.

As recognized by Graske, the Third Circuit agrees that admiralty jurisdiction extends to torts that occur in foreign waters. *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166 (3rd Cir. 1995); *Malaysia Intern. Shipping Corp. v. Sinochem Intern. Co. Ltd.*, 436 F.3d 349 (3rd Cir. 2006) (rev'd on other grounds, 549 U.S. 422 (2001)). It is of passing interest that in *Sinochem Intern. Co. Ltd.*, while this Court only considered the *forum non conveniens* issue, it expressed no concerns regarding the district court's and Third Circuit's conclusion that admiralty subject matter jurisdiction existed.

In *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995) the court held that admiralty jurisdiction extends to a tort that occurred in the territorial waters of the United Arab Emirates. Likewise, in *Roberts v. United States*, 498 F.2d 520 (9th Cir. 1974), the Ninth Circuit found that a general maritime claim could be pursued when the tort occurred in Japanese territorial waters.

While jurisdictional questions can be raised at any time, the fact that this issue was not raised until the eleventh hour reveals the weakness of Graske's argument. See *Clinton v. City of New York*, 524 U.S. 417, at 428, 118 S.Ct. 2091 (1998) ("The fact that the argument did not previously occur to the able lawyers for the Government does, however, confirm our view . . . ").

Contrary to Graske's assertion, this Court extends admiralty jurisdiction to cases arising in the waters of other countries. The Third, Fifth, Eighth, and Ninth Circuits all follow this Court's decisions. However, Graske has not cited any circuit court decision to the contrary. There are no conflicts between the courts of appeals, nor is the decision of the Eighth Circuit in conflict with any of this Court's decisions. Thus, there are no "compelling reasons" that support granting this Petition. See Sup. Ct. Rule 10. Graske's Petition for Writ of Certiorari should be denied.

IV. Graske's Reasonable Care Question Does Not Merit Review.

Graske's second question is simply an attempt to retry the facts in this Court. It is telling that Graske devoted only two and a half pages to this "issue". This question cannot even pretend to be worthy of this Court's review.

Both the trial court and the court of appeals applied the reasonable or ordinary standards of care that Graske argues are applicable in this case. Pet. App. 6, 43-45. While Graske does not like the outcome, this is a case where the correct rules of law were applied, and the decisions were supported by the evidence. Thus, this is an issue that does not merit this Court's time or review. See Sup. Ct. Rule 10.

CONCLUSION

Graske's strategy of invoking admiralty jurisdiction, but then questioning it when the courts rule against him, should not be rewarded by this Court. It has long been recognized that admiralty jurisdiction extends to torts that occur in the waters off the coast of a foreign country. Furthermore, both the trial court and the court of appeals applied the correct legal standards to arrive at their decisions. Thus, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH B. MULLER
(*Counsel of Record*)
RONALD J. PALAGI
LAW OFFICES OF
RONALD J. PALAGI, P.C., L.L.O.
3131 South 72nd Street
Omaha, NE 68124
(402) 397-5000
joe@ronaldjpalagi.com

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DANIEL DOYLE AND ANNE DOYLE, Plaintiffs/Appellees, v. LELAND GRASKE, Defendant/Appellant.	Case No. 08-3144 **APPELLANT'S DESIGNATION AND STATEMENT OF ISSUES** (Filed Sep. 26, 2008)

COMES NOW the Appellant, Leland Graske ("Graske"), and designates his statement of issues as follows:

1. Whether the trial court erred in finding that Graske did not exercise reasonable care for the safety of Doyle;

2. Whether the trial court erred in finding that the bow seat of the boat is a position of danger for a passenger while the boat is accelerated up to plane on the open ocean;

3. Whether the trial court erred in finding that Graske knew or should have known that Doyle was in a position of danger in the bow seat while the boat was accelerated up to plane on the open ocean;

4. Whether the trial court erred in finding that, even if Doyle was in the bow seat when the accident occurred, then Graske was negligent in continuing to accelerate the boat while knowing that Doyle was not holding the hand straps;

5. Whether the trial court erred in finding that the sudden mechanical failure caused by the negligence of Kirk Marine and its mechanic were foreseeable to Graske;

6. Whether the trial court erred in finding that the negligence of Graske was a proximate cause of Doyle's injuries;

7. Whether the trial court erred in concluding that Graske had a higher duty of care for Doyle's safety than did Doyle himself;

8. Whether the trial court erred in allocating only 10% of the total causal fault for Plaintiffs' damages to Daniel Doyle;

9. Whether damages for loss of consortium are recoverable in a maritime action; and

10. Whether, even if recoverable, the trial court erred in failing to reduce the loss-of-consortium damages of Anne Doyle by Daniel Doyle's percentage of causal fault.

Dated this 26th day of September, 2008.

LELAND GRASKE,
Defendant/Appellant

By: s/ Francie C. Riedmann

Thomas A. Grennan, #15675
Francie C. Riedmann #20143
Gross & Welch, P.C., L.L.O.
2120 South 72nd Street
1500 Omaha Tower
Omaha, NE 68124
Telephone 402-392-1500
Facsimile 402-392-8101

Email
tgrennan@grosswelch.com
ecallaghan@grosswelch.com
friedmann@grosswelch.com

and

George W. Soule
Bowman and Brooke LLP
150 South 5th Street, Suite 3000
Minneapolis, MN 55402
Telephone 612-339-8682
Facsimile 612-672-3200

Email
george.soule@bowmanandbrooke.com

Attorneys for Defendant/Appellant